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Foreword

What happens to international environmental agreements once they are signed, and how does the implementation of such agreements influence their effectiveness? These are the questions that motivate the Implementation and Effectiveness of International Environmental Commitments (IEC) Project at the International Institute for Applied Systems Analysis (IIASA), Laxenburg, Austria.

In this IEC essay, Cesare Romano reviews and assesses efforts within the International Labour Organization (ILO) to supervise national implementation of international labor standards. Today, ILO supervision includes an active system of regular reviews as well as several special procedures that can be invoked on an ad hoc basis to handle particular problems of noncompliance when they arise. Developed over 70 years, it is the most elaborate and active multilateral compliance supervision system in international law.

Romano applies lessons from the ILO experience to the design of possible multilateral supervision systems within environmental agreements. He focuses in particular on the Multilateral Consultative Process (Article 13) of the United Nations Framework Convention on Climate Change. This essay is one of three from the IEC Project that apply historical experience to the possible designs for Article 13 of the Climate Convention. The essays are contributions to the work of the Advisory Group on Article 13, a legal and technical expert body that is currently exploring the need and possible designs for Article 13.

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Executive Summary

The International Labour Organization (ILO) is a specialized agency of the United Nations particularly active in protecting those human rights related to labor conditions. Since its foundation in 1919, the ILO has developed a comprehensive international labor code. Today, ILO standards, codified in 176 conventions and 183 recommendations, address labor conditions in more than 170 Member States.

A cornerstone of the ILO's activity is its unique and effective system of supervision of the implementation of ILO standards. This paper analyzes the different factors that contribute to the effectiveness of the ILO supervisory system, which are themselves the subject of some debate. It also focuses on lessons that may be applicable to the United Nations Framework Convention on Climate Change, particularly in the ongoing debate on the design of mechanisms under Article 13 (the Multilateral Consultative Process). The specific functions of Article 13 still remain unclear; however, they might include dispute avoidance mechanisms, supervision of implementation, and/or management of noncompliance. The ILO's experience offers relevant insight into each of these functions. Yet, a strong caveat must be introduced. The ILO and environmental regimes differ greatly in their aims, structure, and historical development. Therefore, lessons from the ILO might be relevant but must be applied with caution.

The main difference between the ILO and other existing international regimes, not only environmental regimes, is the ILO's unique tripartite structure of representatives of governments, workers, and employers. Non-State actors are represented on an equal footing with States in the plenary organ (the International Labour Conference) and in the executive organ (the Governing Body). They play a key role in the adoption of international labor standards and, therefore, are equal participants in all supervisory procedures. The majority of cases under ad hoc procedures have been initiated by non-State actors, mainly workers organizations. Without their participation, the ILO supervisory system would be significantly less effective. This suggests that allowing non-State actors to play

a role in supervisory mechanisms could enhance the implementation of international commitments overall. Yet, this specific lesson from the ILO experience can hardly be applied to multilateral environmental treaties. In fact, the role of non-State actors in supervisory procedures depends fundamentally on how they are integrated into the organization as a whole – from the setting of standards to the supervision of their implementation.

The ILO supervisory system has a dual approach that ultimately forms a loop. On one side, the regular procedure provides routine reviews of the implementation of ILO standards. On the other side, several ad hoc procedures can be activated on an adversarial basis to handle alleged cases of noncompliance. Compliance issues are examined by two tiers of complementary bodies: first by relatively small technical bodies (for example, the Committee of Experts on the Application of Conventions and Recommendations and the tripartite Committee on Freedom of Association), and then by larger, more politically oriented organs (the Governing Body and/or eventually the International Labour Conference and its Committee on Applications). The ability of the ILO supervisory system to improve the implementation of ILO standards owes much to this division of competencies between small technical organs and large political bodies, which can reinforce each other's actions. Most issues involving application are handled by the Committee of Experts; political bodies focus their attention on the more difficult and delicate matters, but they may and often do refer them back to the Committee of Experts for further monitoring.

The main feature of the ILO supervisory system is that, rather than settling formal disputes, it uses regular supervision to help avoid disputes altogether and to enhance overall compliance. This particular characteristic is highly relevant to today's debates on the design of consultation and dispute avoidance mechanisms in multilateral environmental agreements. Indeed, whereas the ILO supervisory system is extremely active and effective, dispute settlement procedures in multilateral environmental agreements have never been invoked.

The ILO experience underscores the importance of an evolutionary approach to the development of systems of supervision. The present structure of the ILO supervisory system is the result of several adjustments made by the International Labour Conference and the Governing Body over more than three-quarters of a century. The system's growth and adaptation over the years, as it has worked to enhance its effectiveness, bear witness to its vitality.

However, despite its long evolution and expanding array of supervisory procedures, the ILO system remains a cohesive structure. The same supervisory system applies to all ILO conventions and is legally binding for all Member States that have ratified them. The authority of the entire system flows from a single

source, the ILO Constitution. Therefore, despite the great number of ILO standards, a single supervisory system helps to reduce the confusion and institutional redundancy that might have resulted had many standard-specific systems been developed. This lesson from the ILO suggests that supervisory functions in the climate regime might be more effective if they have a common core under Article 13 that applies to all subsequent climate commitments (for example, Protocols to the Framework Convention) and develop subsidiary ad hoc procedures as needed for particular obligations.

Of the different procedures available in the ILO supervisory system, the regular procedure has achieved the greatest results. It is the heart of the whole system, where most of the supervisory work takes place. The regular procedure hinges on periodic reports that Member States are required to submit on the measures taken to implement the provisions of the conventions they have ratified. These reports are reviewed through the regular procedure, during which specific issues and problems are highlighted for further attention by the standing Committee of Experts; some are then examined by the International Labour Conference.

A crucial asset of the ILO supervisory system is that it offers a continuum of procedures, from the regular to the ad hoc systems. The ad hoc procedures, which are activated on an adversarial basis, were developed to deal with issues of noncompliance. They range from the soft and politically oriented representation procedure to the quasi-judicial complaints procedure. Moreover, the ILO has developed some special procedures for dealing with cases of noncompliance with certain fundamentally important conventions, notably those concerning the freedom of association and the right to engage in collective bargaining. The general characteristic of all these ad hoc procedures is that they are activated only when needed; they are, to different degrees, confrontational in their approach; and they provide for a two-tiered review. The substance of the work is carried out by a tripartite committee of ILO Governing Body members of an independent panel of experts named by it; any decision on measures to be taken to induce noncompliant States back into compliance are adopted by the Governing Body, a politically oriented body.

The ILO's high degree of effectiveness stems not only from the flexibility and broad scope of its supervisory procedure but also from the particular features of the norms whose implementation is to be monitored. ILO Member States have the possibility of making an "*à la carte*" ratification, opting for only certain provisions of ILO conventions when the text so provides. Moreover, an ILO convention is adopted only after its subject matter has reached a sufficient degree of development and importance, and there is widespread consensus. Such a system clearly depends on the States' willingness to commit themselves through ratification.

To this end, the ILO Director-General is particularly engaged in promoting the ratification of ILO conventions. Furthermore, the ILO has developed some procedures for limited supervision of nonbinding standards (recommendations and unratified conventions). This particular ILO experience illustrates how relevant but nonbinding commitments can be integrated into the larger complex of legal standards that influence a State's behavior.

Finally, the efforts to strengthen ILO supervision have included providing assistance to Member States in order to increase the implementation of ILO standards. The effectiveness of the ILO supervisory system is enhanced because supervision takes place alongside ILO efforts to provide technical assistance to Member States. This offers direct benefits to the countries and improves their capacity to participate in the work of the ILO.

A system of direct contacts between a representative of the ILO Director-General and Member States is used to increase dialogue, provide advice to Member States, facilitate conciliation, and, in a few cases, to assist in fact-finding. These procedures are by nature extremely flexible and appear to possess considerable growth potential.

In short, the ILO has been remarkably effective in promoting the implementation of labor commitments. However, ILO supervisory procedures, in general, are not able to overcome major cases of noncompliance in short periods of time. In the field of environmental protection, where damage is cumulative, a time-consuming process for resolving cases of noncompliance may be problematic. Continual noncompliance with environmental obligations, even by relatively few States, might offset the efforts of the majority of States that do comply. It may also undermine confidence, which is ultimately essential to the continuation of effective collaboration to solve common environmental problems.

Finally, the ILO experience strongly suggests that building any system of supervision requires time for growth, learning, and adjustment. With that in mind, architects of supervisory systems in other regimes, including the climate regime, might limit their action to the adoption of modest systems at the early stages and explicitly provide for their adjustment over time.

Introduction

As the Preamble to the ILO Constitution proclaims, universal and lasting peace can be established only if it is based on social justice.[1] This principle, which is reaffirmed in the Declaration of Philadelphia, has always guided the actions of the ILO.[2] It should be the basis of policy for all member States in conformity with the notion that “the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries.”[3] The ILO was founded in 1919 primarily to improve living and working conditions by building a comprehensive international labor code. This standard-setting function is still the main means of action of the ILO.[4] A total of 359 international labor instruments were adopted by the International Labour Conference between 1919 and 1995 (176 conventions and 183 recommendations). As of 8 December 1995, the total number of ratifications was 6,292. At the end of 1995, 173 States were members of the organization.[5]

Such an enormous legislative effort would be devoid of any practical meaning if it were not sustained by effective supervision of its application. This is why supervision of States’ application of standards (conventions and recommendations) is ranked among the most important of the ILO’s activities.

With the end of the Cold War, some of the States’ criticism and wariness of the ILO compliance monitoring system has disappeared.[6] Since the end of the 1980s there has been a steady increase in the number of Member States as well as progress in the number of ratifications of ILO conventions and in the implementation of ILO standards. Finally, the increased interdependence of domestic markets and the consequent rise in levels of economic competition have heightened the importance of labor standards and their effective implementation as a means of achieving a “level playing field” among competitors subject to different national regulatory systems.

This paper intends to provide the reader with a review of the operation and effectiveness of the principal elements of the ILO supervisory system. The ILO’s supervisory procedure is, by far, the oldest of the systems of supervision managed

by international organizations. Its basic principles were established at the same time the ILO was created, in 1919, whereas the other systems of some importance were created less than a decade later and then again at the end of World War II. The ILO is the only major intergovernmental organization to have survived the Second World War and the demise of the League of Nations. In 1945 it became a specialized agency of the United Nations. Because of the experience acquired during its 77 years in use, the ILO compliance monitoring procedure still serves as a point of reference for other international organizations and legal regimes.[7]

In the past decade, environmental issues have gained international prominence. As with labor standards, it is increasingly important that international agreements to protect the environment include measures to ensure compliance. Typically, international environmental treaties include dispute settlement procedures that could serve this function. In practice, such procedures are never used. In part, this nonuse reflects that formal dispute settlement requires the existence of both an overt dispute and demonstrable injury from noncompliance. However, environmental problems such as ozone depletion and global warming are cumulative and incompletely understood. Policy action and compliance with international environmental agreements must occur long before any material damage can be proved. Furthermore, in multilateral agreements the benefits of compliance are dispersed among many parties. No single party has a strong incentive to identify and pursue a bilateral dispute. These are the reasons the ILO's multilateral system for supervision, which helps avoid disputes and ensure compliance, is relevant to today's debates on the design of dispute avoidance and compliance control mechanisms in multilateral environmental agreements.

In the second part of this work, the review of the ILO supervisory system will be used to ascertain the main lessons that can be applied to those multilateral environmental treaties where these issues are being debated in an effort to design effective dispute avoidance and settlement mechanisms. In this sense, the paper will focus on those lessons that can be applied directly to the United Nations Framework Convention on Climate Change, particularly to the ongoing debate on design mechanisms under Article 13 of the Convention and its relation to the system of regular review of "national communications." [8]

The ILO System of Supervision

ILO Institutional Structure

The ILO is composed of a yearly plenary assembly, the International Labour Conference; an executive council, the Governing Body; and a permanent secretariat, the International Labour Office.

The International Labour Conference elects the Governing Body, adopts the organization's budget, sets international labor standards, and provides a forum for the discussion of social and labor questions. Each national delegation is composed of four persons: two government delegates, one employers delegate, and one workers delegate, who may be accompanied by a limited number of technical advisers. Adoption of a decision in the form of a convention or recommendation requires a majority of two-thirds of the votes cast by the accredited delegates present. Conventions enter into force for each Member State only after they are ratified. Conversely, recommendations are not legally binding on Member States.

The Governing Body holds three sessions a year. It is composed of 28 government members, 14 employer members, and 14 worker members, plus deputy members. Ten States of chief industrial importance have permanent government representatives, the others are elected by the Conference every three years.

Finally, the International Labour Office is headed by a Director-General elected by the Governing Body.

The Supervisory System of the ILO

The ILO is characterized by three basic features: one of its main means of action is the adoption of international treaties; it is endowed with a unique tripartite structure of government, labor, and employer representatives; and it is endowed with detailed supervisory procedures.[9]

The supervisory system of the ILO is essentially based on two types of procedures – a regular procedure and ad hoc procedures (i.e., activated on an adversarial basis).[10] The basis of the ILO's supervisory system is described in its Constitution.[11] However, its present structure is the result of a series of adjustments made by the Conference and the Governing Body over the years in an effort to adapt the procedure to the increasing numbers of conventions and States that are parties to them.[12] Notably, because of the constant increase in the number of conventions, it became impossible for the International Labour Conference to examine at its annual sessions all the reports that the governments were obliged to submit on their implementation of ILO conventions. Thus, in 1926 the Governing Body established two special bodies to deal with these reports: the independent Committee of Experts on the Application of Conventions and Recommendations and the Conference Committee on the Application of Conventions.[13]

Regular Procedure and National Reporting System

The regular procedure is described in Articles 19, 22, and 23 of the Constitution. Paragraphs 5, 6, and 7 of Article 19 contain a series of requirements designed to ensure that the executive and legislative branches of Member States give full consideration to both the possibility of implementing and the advisability of ratifying a convention. Namely, the instrument, either a convention or a recommendation, must, within a period of 12 to 18 months after its adoption by the International Labour Conference, be brought before the competent national authority or authorities for the enactment of domestic legislation or other action. Clearly, only duly ratified conventions become legally binding at the international level. If the competent authority agrees to ratify a convention, then the Member State will communicate the formal instrument of ratification to the International Labour Office and will take such action as may be necessary to implement the provisions of the convention.[14]

The ILO supervisory system relies on periodic reports that Member States, under Article 22 of the ILO Constitution, are obliged to present to the International Labour Office on measures taken to implement provisions of the conventions they have ratified. These reports should be in the form and should contain the particulars requested by the Governing Body (see Appendices I and II). Moreover, under the 1946 amendments to the ILO Constitution, governments must distribute copies of these reports to those workers and employers organizations that are represented in the International Labour Conference in order to solicit their

observations.[15] During 1995, the ILO received 159 observations, 38 of which were from employers organizations and 121 from workers organizations, for examination by the Committee of Experts.[16] The fact that the great majority of observations received usually concern the implementation of ratified conventions bears witness of the key role played by non-State entities in the ILO compliance monitoring system.[17] Finally, it should be stressed that, of the observations received during 1995, 90 were communicated directly to the Organization, while 69 were communicated to the ILO by the governments, which in some cases added their own comments.[18]

The Constitution in itself does not contain extensive provisions on how national reports must be examined. Article 23(1) of the Constitution merely states that the Director-General shall lay before the next meeting of the Conference a summary of the information and reports communicated to him by members in pursuance of Articles 19 and 22. In reality, a much more complex supervisory system has been put in place through a series of decisions by the Governing Body. Neither the International Labour Office, which is the secretariat of the Organization, nor the Conference, which is essentially a deliberative, political body, could properly carry out a thorough and objective evaluation of the governments' reports.[19] The procedure was, therefore, delegated to an independent technical body, the Committee of Experts on the Application of Conventions and Recommendations.

The Committee of Experts is currently composed of 20 members (compared with 8 during its initial period of operation) who sit in their personal capacities. The members are proposed by the Director-General and appointed by the Governing Body for three-year terms. Member States, therefore, are not directly involved in the process. The perception that the members of the ILO Committee of Experts are objectively selected rather than politically appointed may have contributed considerably to its reputation for objectivity and competence. Often, members of the Committee of Experts are reappointed for successive terms. All are eminent jurists, expert either in labor law or public international law.

The Committee of Experts meets annually on a date fixed by the Governing Body. Its role is to carry out an independent and technical evaluation of the national reports and to report to the Conference on the degree to which national practices and legislation conform to international obligations.[20]

From the beginning, the Committee of Experts has been fully aware that a key objective of supervision is to obtain full and accurate data.[21] To this end, the ILO developed the practice of sending a detailed questionnaire to the parties to each convention. The questionnaire concentrates on four sources of information: national legislation; judicial decisions; reports of activities of labor

inspection services; and information on the participation of employers and workers organizations.

The purpose of this questionnaire is to make it possible to determine whether a country's domestic law and practice conform to the relevant ILO conventions and recommendations, and the ILO Constitution. Undeniably, governments can try to avoid control by simply neglecting to mention any piece of legislation or practice that is not compatible with the conventions concerned. To avoid this risk, governments are requested to send copies of their reports to national organizations of employers and workers, which may present comments thereon.[22] Non-State entities are, therefore, extremely important for the ILO system because they increase the credibility of the data-gathering process.

The steady increase of the Committee of Experts' workload, resulting from the increases in the number of Member States and the number of conventions adopted and ratified has obliged the Committee to review its procedure three times: in 1959, in 1976, and in 1993.[23] The 1959 adjustment provided that detailed reports on ratified conventions should no longer be requested each year, but every two years. In 1976, the Governing Body decided to further reduce the frequency of reports. As a general rule, reports would henceforth be requested every four years, although the two-year period was retained for the most important conventions, in particular those concerning freedom of association, forced labor, and discrimination.

The last adjustment, in 1993, introduced an even more elaborate structure.[24] As a general rule, reports are now due every five years, with some exceptions. A detailed first report is requested in the year following the enactment of a convention in a given State. A second detailed report is automatically requested two years after the first. For some important conventions, like those on the freedom of association (nos. 87 and 98), forced labor (nos. 29 and 105), equal treatment (nos. 100 and 111), labor inspection (nos. 81 and 129), and tripartite consultations (no. 144), reports are due every three years. A further category of reports was introduced that includes any report that the Conference Committee or the Committee of Experts might request on their own initiative. Finally, the obligation to submit reports has been waived for 21 conventions that were deemed not to correspond to present-day needs.[25]

During 1995, 1,252 detailed reports were due under Article 22 of the ILO Constitution.[26] However, by the end of its 83rd Session, the Committee of Experts had received only 824 reports, a mere 65%.[27] Only 38.2% had been received within the fixed deadline, although late reports may also be examined. Some reports were incomplete and therefore did not allow the Committee of

Experts to reach substantive conclusions on Member States' implementation of the conventions concerned.

The ILO Committee of Experts undertakes a technical examination of reports submitted on ratified conventions in a closed session, without the presence of the States' representatives or those of organizations of employers or workers. There is no media publicity covering the work of the Committee. Closed meetings, the absence of publicity, and the absence of parties' representatives have contributed significantly to the depoliticization of the ILO's regular review, thus enhancing the reputation of the Committee.[28]

All these efforts to obtain objective, credible, and meaningful reports through the independent judgment of technical experts are aimed to provide a solid basis for discussion at the annual sessions of the International Labour Conference and, in particular, for discussion in the Conference Committee. The Conference Committee is a tripartite organ consisting of representatives of governments, employers, and workers.[29] Moreover, voting within the Conference Committee is weighted to give equal strength to each group.[30] The Conference Committee's tripartite composition makes it a particularly effective part of the procedure. The participation of nongovernmental interests directly concerned with the issues enables the Committee to more closely grasp the problems of implementation and the various political interests than would be possible in a body merely composed of independent experts.

The aim of the Conference Committee proceedings is to give governments the opportunity to add, through their representatives, any observations they think desirable to make; to clear up any points to which the Committee of Experts has drawn attention; or to seek guidance on how to overcome any difficulties met in the implementation of their commitments.[31] The Conference Committee is free to concentrate on those Experts' comments that it considers to be of special interest, and it is not bound by the conclusions contained in the report of the Committee of Experts. Finally, despite the divergent views often expressed when the Committee of Experts' report is discussed in the Conference, the report is usually adopted unanimously, not only because of obvious time constraints, but probably also because the members of the Conference do not want to undermine the credibility of the entire supervisory system by arguing about the conclusions of the Committee of Experts.[32] The final outcome of the Conference Committee procedure is a new report that is discussed and submitted for adoption by the plenary International Labour Conference.

The mandate of the Conference Committee is quite vague. Article 7 of the Standing Orders of the Conference merely states that its tasks are to consider the measures taken by members to implement the conventions, to study information

furnished by members concerning the results of inspection, and to submit a report to the Conference. The Conference Committee's procedure is public and, comprising some 200 members, it differs substantially in composition from the Committee of Experts. Thus, the Conference Committee, on the whole, does not serve a judicial function; it simply provides a forum for the discussion of problems governments encounter when implementing their obligations and at the same time exposes the debate to public scrutiny.

Despite this "soft" approach to States' compliance with ILO conventions, the Conference Committee has developed a practice of singling out States that have not adequately implemented ratified conventions. The States' sometimes harsh reactions to special mention in these reports is evidence that the "mobilization of shame" is a sensitive matter that governments do not take lightly or ignore. In three cases the report of the Conference Committee was not adopted because of a deliberately engineered lack of quorum (in 1974, 1977, and 1982).[33] Moreover, in 1977 the USA withdrew from the ILO on the grounds, *inter alia*, that ILO activities were lacking in due process, evidenced a double standard, and ultimately, were increasingly politicized. Despite all these criticisms the ILO constituency, and notably the workers' representatives, have strongly defended the ILO. For example, from 1977 to 1980, the period in which the USA was not a member, a number of countries made voluntary contributions to the Organization.

The ILO experience, therefore, establishes that criticism of States, however diplomatically worded, may elicit strong opposition from those criticized and their allies, and may in the end threaten the very existence of the review system. Only a well-established, technically credible committee that has a firm reputation for objectivity and competence and that is backed by the organization as a whole can withstand bitter political opposition.

Procedure for the Supervision and Recommendations of Unratified Conventions

As a complement to the regular procedure for supervision of ratified conventions, the ILO supervisory system also includes a regular survey of national legislation related to conventions that have not been ratified [as set forth in Articles 19(5)(e) and 6(d) of the ILO Constitution]. This complementary review cannot be considered a strictly supervisory one. It is merely concerned with the action taken by Member States with respect to recommendations and unratified conventions; usually, it does not examine individual situations in depth.

Under Article 19, general surveys are made yearly by the Committee of Experts on a subject selected by the Governing Body (e.g., the subject in 1994 was the freedom of association and collective bargaining). The fundamental conventions

have periodically been selected, and the ILO Governing Body recently decided to make this a regular practice for instruments dealing with freedom of association and collective bargaining, forced labor, discrimination, equal remuneration, and child labor. The general reports contain a broad analysis of domestic laws, administrative action, and collective agreements, as well as comments by the Committee of Experts on their consistency with the instruments in question.

Employers and workers organizations are encouraged to comment on reports made by their governments for these general surveys. Moreover, while information provided by governments usually relates to obstacles to ratification, comments made by employers and workers organizations can refer to possible abuses arising from the fact that the State concerned is not bound by a particular convention. A certain number of employers and workers organizations already make use of this possibility.[34] Depending on the nature of the comments received, the Committee of Experts, the Conference Committee, and the Governing Body might discuss a particular situation and in certain cases suggest that there be direct contacts between the Office and the government in an effort to overcome the difficulties. The comments might also lead the supervisory bodies to recommend that ILO technical assistance be used to overcome problems encountered by governments in ratifying the convention. They might also recommend an examination of the problems encountered by workers and employers organizations as a consequence of a government's failure to ratify the convention at issue.

Under Article 19(5)(e), Member States are requested to explain the difficulties that prevent or delay the ratification of ILO conventions. This explains why the analysis of these surveys has continued to grow in importance. Despite their relevance, some conventions have not been ratified because certain provisions are considered by Member States to be too inflexible and certain requirements too demanding. In this sense, the general surveys produced by the Committee of Experts represent a unique source of information for revising, updating, and improving ILO standards in order to promote their adoption by Member States.[35] In fact, ILO instruments basically aim to set minimum standards. Knowing why a State fails to ratify an ILO convention could provide useful insight for striking a better balance between the minimum common denominator among Member States and the progressive development of international obligations in the labor field.

Ad Hoc Procedures

During its first 40 years of existence, the supervisory system of the ILO, more or less, consisted only of the regular procedure based on national reports. The regular

procedure is still the fulcrum of the whole ILO supervisory system. However, during the past 30 years, ad hoc procedures have gained prominence in the ILO. In the ILO supervisory system, there exist four mechanisms that on an ad hoc basis can be activated by adversarial action. All are more adversarial than the regular procedure. The current and presumably long-term trend seems to be toward a balance between regular and ad hoc procedures.

The Representation Procedure

Since 1919, under Article 24 of the ILO Constitution, employers and workers associations can make a *representation* to the International Labour Office that a member has failed to secure the effective observance within its jurisdiction of a convention to which it is a party. During the period from 1985 to 1995, about 30 such cases reached the Governing Body.

If the Governing Body decides that a representation is receivable, it sets up an Examination Committee composed of members of the Governing Body chosen in equal numbers from the government, employers, and workers groups.[36] During its examination of the case, the Governing Body may decide to communicate this representation to the government against which it has been made and may invite that government to make a statement on the subject should it wish to do so. When the Committee has completed its examination of the substance of the representation, it presents a report to the Governing Body containing its conclusions on the issues raised and recommendations as to decisions the Governing Body should make. When the Governing Body considers the report of the Committee, it must invite the government concerned, if not already represented in the Governing Body, to send a representative to take part in the proceedings, though without the right to vote.

The final outcome of the Governing Body's review is simply the eventual publication of the representation and any government statement made in reply to it.[37] This procedure is, thus, a minor and indirect sanction. The Governing Body does not enter into the merits of the representation (for instance, by commenting on it) or those of the measures taken by the State against whom the representation was made. Moreover, the entire procedure remains on a political level, devoid of any technical review, and is held in private. The Governing Body's action simply gives public exposure to the conduct of Member States in certain cases. In some cases, it may recommend that the Committee of Experts continue to monitor the situation.

The representation procedure, being soft and strictly political in complexion, represents a preliminary but not legally necessary step in the ideally escalating

nature of the ILO supervisory system. The ILO system provides for a much more adversarial and technical procedure, the complaints procedure.

The Complaints Procedure

A second, more intrusive and complex adversarial procedure is contained in Articles 26 to 34 of the ILO Constitution.[38] Any member can initiate this procedure by filing a *complaint* with the International Labour Office against any other member concerning an alleged breach of a convention that both members have ratified.[39] The procedures can also be instigated by the Governing Body on its own initiative, or by a delegate to the Conference in his or her personal capacity.[40]

One of the main characteristics of the ILO complaints procedure is that the filing of a complaint does not presuppose any direct injury to the plaintiff or, in the case of complaints filed by States, to its nationals. In fact, the ILO conventions typically have a “collective structure.” “Bilateral structures” prevail in those multilateral treaties that involve rights and obligations performed on a reciprocal basis between pairs of States, as in the case of the Vienna Convention on Consular Relations (1963) and the Vienna Convention on Diplomatic Relations (1961). “Collective structures” of obligation prevail when the nature of the rule in question requires each party to adopt a course of conduct that is not owed to any other individual party but is necessarily performed simultaneously toward all other parties.[41]

Again, the obligations assumed in international law under collective agreements do not represent a specific duty toward another party, but rather promote the interest common to all parties.[42] This is typically the case with multilateral treaties not only in the area of environmental protection but also in the field of human rights.[43] Hence, every State that is party to a treaty concerning this type of problem has the right to require every other party to fulfill its obligations under the treaty and, accordingly, is deemed to be injured whenever one of those obligations is breached.[44] Given the collective nature of the obligations contained in ILO conventions, it follows that the action of a commission of inquiry cannot be merely limited to information provided by the parties, but that it must be endowed with truly investigative powers.[45]

It is interesting to note that the “collective structure” of the ILO conventions contains a paradox. The complainant State does not have to demonstrate that it is in compliance with the convention that is the subject of its own complaint. Furthermore, even if a State is subject to the complaints procedure, it is not prevented from initiating a complaint regarding infringement of the same convention.

This situation occurred in 1963, when a complaint was filed by Portugal against Liberia concerning the observance of the Forced Labour Convention while a complaint filed by Ghana in 1961 against Portugal was before the first Commission of Inquiry.

In the preliminary phase of the complaints procedure, the Governing Body communicates with the government in question.[46] After this phase, it may appoint a commission of inquiry to consider and report on the complaint. The Governing Body is free to decide whether or not it is appropriate to do so under the existing circumstances.[47] There is no recourse against this decision. Clearly, the Governing Body's examination of the case is simply a *prima facie* one inasmuch as it is not based on the merits of the complaint.

The ILO commissions of inquiry are composed of three members, who sit in their personal capacities; members are proposed by the Director-General and appointed by the Governing Body. It should be stressed that the parties involved in the procedure are not consulted in this nomination. This practice is at variance with the system used for traditional commissions of inquiry, whereby the designation of commissioners is the exclusive prerogative of the parties to the procedure. Usually, the members of the commissions of inquiry are judges from a high level of jurisdiction, both national and international, and eminent scholars.[48]

The commissions of inquiry are free to decide their own procedure. However, during past 30 years of practice they have developed a well-consolidated procedure. First, the parties involved are requested to submit to the commission a written statement on the inquiry, called a memorial. ILO commissions of inquiry may ask for memorials from not only the parties involved, but also other governments, international organizations, workers and employers organizations, and nongovernmental organizations. The commission normally asks the parties to submit a list of witnesses so it can decide on their relevance.

After this preliminary phase, the case is heard in camera. The representatives of the parties involved as well as selected witnesses are heard. The representatives of the parties involved can ask the witnesses questions. In some cases, commissions of inquiry have decided to carry out on-site visits and have requested assistance for this purpose from the government concerned.[49] During an on-site visit, the commission decides its own schedule and travel plans, and is not accompanied by representatives of any party. The commissions of inquiry have interviewed people without the presence of government representatives and have usually asked host governments to ensure that those interviewed are not subjected to punitive measures as a consequence of these interviews. Usually, on-site visits are long and detailed in order to give the commission of inquiry all the data necessary to write its report.

Admittedly, the effectiveness of ILO commissions of inquiry depends heavily on the cooperation of the governments involved. In one case a government categorically refused to cooperate: in 1983, Poland from the very beginning refused to work with the Commission of Inquiry established to investigate the alleged breach of the conventions on freedom of association, claiming that the decision of the Governing Body constituted “an interference in Poland’s internal affairs” and that the ILO was being used “in a manner contrary to the spirit and letter of its Constitution.”[50] The lack of cooperation by Poland did not, however, prevent the Commission of Inquiry from making a precise evaluation of the situation as a whole and reaching a conclusion. To bypass the Polish government’s resistance, the Commission systematically took account of both the information that Poland provided to and the position it adopted before other organs of the ILO, such as the Committee on Freedom of Association, the Committee of Experts, and the Conference Committee under the regular procedure of Article 22 of the ILO Constitution. The Commission also took account of various legislative texts published in Poland, official and public documents, information derived from the communications between Poland and other ILO organs, and evidence from persons who had direct, recent experience with the trade union situation in Poland. Hence, as the Commission of Inquiry stated in its report, neither its establishment nor its work is conditional upon the agreement or the actual cooperation of the State concerned.[51]

If a breach of a Convention is ascertained, the commission of inquiry may include in its report recommendations of steps that should be taken to satisfy the basis of the complaint.

Under Article 29(1), the report of the commission of inquiry must be communicated via the Director-General to the Governing Body and to each of the governments involved in the complaint. The report must also be published. Such reports have appeared as special issues of the *ILO Official Bulletin*. This communication allows the governments involved to inform the Director-General, within three months, whether or not each of them accepts the recommendations contained in the report of the commission. This does not mean that the ILO Constitution makes the results of a commission of inquiry subject to the consent of the States concerned, nor does the refusal of the recommendations by the defaulting government affect the validity of the commission’s conclusions.[52] If the conclusions are rejected, any of the States involved can refer the complaint to the International Court of Justice (ICJ), whose decision is final.[53] The ICJ can affirm, vary, or reverse any of the findings or recommendations of the ILO commission of inquiry. Therefore, the ICJ represents a kind of final, appellate, and merely optional jurisdiction, which comes only after recourse to a commission of inquiry.

In the majority of cases, the governments involved have accepted the commission's report.[54] Article 33 of the ILO Constitution provides that, in the event that a Member State fails to carry out the recommendations of the commission of inquiry or the decisions of the ICJ within the time specified, the Governing Body may recommend to the Conference such action as it deems wise and expedient to secure compliance.[55] However, under Article 34, the defaulting government can at any time inform the Governing Body that it has taken the steps necessary to comply with the recommendations or the decision of the ICJ and can demand a further commission of inquiry to verify its contention. If this second report is in favor of the defaulting government, the Governing Body shall recommend the discontinuance of any proceedings. No case has ever been referred to the ICJ, and thus Articles 33 and 34 have not been used yet in practice.

In all cases, the commissions of inquiry have found the legislation and practice under investigation to be contrary to the ILO conventions at issue or to the spirit of the ILO Constitution. It has recommended the formal repeal of legislation and discontinuance of practices found to be contrary to ILO principles.[56] It has also recommended regular reporting, based on Article 22 of the ILO Constitution, on the action taken to implement the recommendations contained in its report.

Finally, it should be stressed that a commission of inquiry does not play a role in the execution of any recommendation it might make; once its report has been communicated to the Governing Body, the commission ceases to exist as such. The political organs of the Organization, i.e., the Governing Body and the International Labour Conference, are responsible for pressuring the government to put the recommendations into effect. This situation is somewhat similar to that of Article 94.2 of the Charter of the United Nations, whereby if a party fails to comply with a judgment of the ICJ (a technical organ that examines the merits of the complaint), the other party may have recourse to the UN Security Council (a political organ), which may make recommendations or decide on measures to be taken to carry out that judgment.

A brief analysis of ILO commissions of inquiry reveals that the functions of an ILO commission of inquiry transcend those of an ordinary inquiry commission under general international law, as codified by the 1907 The Hague Convention.[57] Indeed, its tasks are not restricted to elucidating the facts by means of an impartial and conscientious investigation, and to making a report, which the parties are at liberty either to accept or to reject. The commission also evaluates the legal conformity of the national practice and legislation to the ILO conventions at issue, which does not require further approval. In other words, ILO commissions of inquiry are quasi-judicial bodies.

The reports of commissions of inquiry, however, are not legally binding on the States.[58] They can be either accepted or rejected. This aspect of the procedure has actually induced many scholars to consider it more a conciliatory than a judicial procedure.[59] However, the ILO procedure differs from a conciliatory procedure under general international law by the very fact that it provides an evaluation of the degree to which the State's national legal practice and legislation conform to the ILO convention. In contrast, a conciliatory procedure seeks an outcome that is *mutually* satisfactory to the parties involved.[60] Moreover, the entire procedure can be initiated either by the Governing Body or by a delegate to the International Labour Conference.[61] Yet, the ILO procedure cannot be considered fully judicial, because the wording of the Constitution does not require formal acceptance of the commission of inquiry's report by any of the parties involved. However, since the Governing Body may, under Article 33, recommend to the Conference "such action as it may deem wise and expedient to secure compliance," there may be consequences for the State concerned.

It should be stressed that any fair-minded assessment of the effectiveness of the ILO commission of inquiry must take into account the general political atmosphere in which the action of the ILO took place. During the first 40 years of the ILO, the regular procedure, involving the examination of the yearly reports, in practice constituted the core of the ILO supervisory system. With the exception of a tentative application in 1934, commissions of inquiry were almost never used.[62] However, from the early 1960s until the end of the 1980s, the regular supervisory system was overwhelmed, not only by the increasing number of conventions, but also by the increasing number of Member States. It was the very tension of those years, characterized by ideological differences and the decolonization process, that probably pushed workers associations and certain governments to consider some infractions as particularly serious and to address them through a more confrontational process. Between 1960 and 1995, more than 20 complaints were filed; 9 of them were submitted by the Governing Body to a commission of inquiry.[63] However, it is extremely significant that since 1989 no commission of inquiry has been established.[64]

Complaints submitted to commissions of inquiry were usually only one aspect of an adversarial political environment. The states concerned were already under heavy political pressure from the international community for the violation of the right to self-determination, as in the case of Portugal, or of political rights at large, as in the cases of Greece, Chile, Poland, and Romania.[65] Other instruments of political and economic pressure, such as sanctions against Poland, had already been set in place. Undoubtedly, these external pressures influenced the final outcome of the ILO procedures. If the States involved were forced back into

compliance, it was not due to a particular measure or sanction imposed on them, but to the effect of the larger array of measures using different procedures that were implemented at different times by the international community as a whole. The re-establishment of freedom of association in Poland, for instance, was clearly due more to the political changes that took place inside Poland, with the emergence of the Solidarity trade union movement, and in the USSR than to the specific actions of the ILO. However, one might wonder what role international shame, echoed in part by ILO action, played in the fall of the iron curtain.

The Freedom of Association Procedure

Along with the *representation* and *complaints* procedures there exists a third ad hoc procedure, the so-called *freedom of association* procedure.[66] A special mechanism has been set up to examine complaints of this nature. Its structure is not contained in the text of the ILO Constitution itself, but was created in 1950 by a decision of the Governing Body and later approved by the International Labour Conference and by the UN Economic and Social Council.[67] The main element of this special procedure is the Governing Body Committee on Freedom of Association, which to date has examined more than 1,800 cases. In recent years, this nine-member tripartite Committee has been called on to deal with a steadily growing number of complaints concerning the infringement of freedom of association. At present, approximately 110 cases involving almost 50 States appear on the agenda of each of its three sessions per year.[68]

The fact that freedom of association is vital for the ILO's very existence provides the rationale for the establishment of a special procedure. Any attack on freedom of association is tantamount to an attack on the very structure of the ILO, which is built on the participation of workers and employers associations, as well as that of governments. This central feature explains why the ILO Constitution itself, in its Preamble, and the Declaration of Philadelphia, which constitutes an integral part thereof, consider the granting of freedom of association a general duty inherent in ILO membership.[69] The main consequence of the special fundamental status of freedom of association within the Organization's basic charter is that the freedom of association procedure can be applied not only to those States that have ratified the relevant conventions on freedom of association, but also to those States that have not.[70] However, in the case of States that have not ratified the conventions on freedom of association, the Committee on Freedom of Association can request information from the government concerned, but no complaint will be referred to the Fact-Finding and Conciliation Commission without the consent of the government.

If this consent is not forthcoming, the Governing Body will consider taking appropriate alternative action designed to safeguard the rights related to freedom of association involved in the case, including measures to give full publicity to the charges made, together with any comments by the government involved, and to that government's refusal to cooperate in ascertaining the facts and initiating measures of conciliation.[71] This compromise between the classic conception of States' sovereignty and the attempt to oblige States to yield to a superior interest of humankind does not reduce the deeply innovative nature of the freedom of association procedure. Yet, unlike the representation and commission of inquiry procedures, this second phase of the freedom of association procedure is not a discretionary power of the ILO.

Nevertheless, the freedom of association procedure shares some features with the representation and complaints procedures. It can be initiated either by a Member State or by a workers or employers organization. In addition, unlike the complaint procedure, the freedom of association procedure can also be initiated by the International Labour Conference following the recommendation of its Credentials Committee, or even by the government against which the allegation of the infringement of trade union rights, for instance, is made under Article 24 of the ILO Constitution. It is worth pointing out that this is a feature that the ILO supervisory system shares with the so-called noncompliance procedures of multilateral environmental treaties.[72] The fact that a state can submit its own noncompliance to the scrutiny of other members reveals that the underlining aim of the whole procedure is to build confidence among members and to search for a satisfactory solution rather than to allocate blame and legally sanction the breach. Clearly, submitting oneself to the procedure would be absurd if the context were one of mere legal responsibility.

The procedure for lodging complaints against governments and bringing them before the Committee has been simplified in an attempt to avoid excessive formalities; allegations can be submitted by telegram or even by postcard. Certain safeguards do exist, however. To be receivable, complaints concerning the infringement of freedom of association must be lodged either by a State, by employers organizations, or, as almost invariably happens, by workers associations. The latter must be a genuine workers association, not a temporary body like a strike committee. It must be a national trade union with a direct interest at stake; an international trade secretariat, if the issue affects one of its affiliates; or one of the international trade union confederations having consultative status with the ILO.[73]

The Committee on Freedom of Association carries out a preliminary analysis of the receivability of the complaint as to the infringement of freedom of association and reports to the Governing Body. The Committee's work is conducted in private. No representatives of the State against which the complaint has been lodged or the workers and employers organizations that have lodged the complaint may be present in the room during the hearings, nor can they participate in the Committee's deliberations.

If the Committee considers the complaint receivable, the Governing Body can refer the case to the Fact-Finding and Conciliation Commission. As of 1995, this had happened only six times.[74] The Commission is composed of nine independent experts appointed by the Governing Body. Its task is to ascertain the facts and, if the existence of a violation is ascertained, to report to the Governing Body, recommending the adoption of measures it deems necessary to restore the observance of freedom of association rights.

The functions of the Fact-Finding and Conciliation Commission are basically similar to those of the Inquiry Commission described above. However, in the former the conciliatory aspect of the procedure is more evident. Indeed, the Fact-Finding and Conciliation Commission is explicitly authorized to "discuss situations referred to it for investigation with the government concerned with a view to securing the adjustment of difficulties by agreement.[75]

Overall, the number of cases of alleged violations of trade union rights submitted to the Committee on the Freedom of Association is far greater than the number of representations and cases in the commissions of inquiry under the ILO Constitution concerning nonobservance of ratified conventions.[76] The frequency with which this machinery is activated has been explained by the fact that the questions it deals with usually involve the very existence of the complainant organization or an affiliate and arise out of a conflict between that organization and the government of the country concerned.[77] Workers organizations have a strong incentive to file such complaints. Indeed, many cases relate to the imprisonment of trade unionists. Moreover, as stated above, the freedom of association procedure may be used even where the relevant conventions have not been ratified and where, therefore, redress through the regular procedure of supervision is not available.

Discrimination in Employment Procedure

A fourth ad hoc procedure was established in 1973 for issues concerning equal treatment. This procedure enables the Director-General to undertake special studies on issues of discrimination in employment on the grounds of race, religion,

nationality, social origin, minority status, or sex. This procedure is not limited to those countries that have ratified the relevant conventions, but can be activated, as the freedom of association procedure, on the basis of membership to the Organization.[78] This procedure can be initiated by any Member State with regard to another Member State; by employers and workers organizations (with the same restrictions valid for the freedom of association procedure; for example, they must be genuine workers association with a direct interest at stake); or by a Member State with regard to questions arising within its own jurisdiction. This last feature of the discrimination in employment procedure is very similar to features of existing noncompliance procedures in multilateral environmental treaties.

Yet, a general survey can be carried out only if the government concerned agrees to it. This is probably one reason that, with the exception of two attempts, this procedure has never been used.[79] No attempt to use this procedure has been made within the past 16 years, but it remains in force. Beginning in 1994, the ILO Governing Body started to consider resuscitating the discrimination in employment procedure by substantially modifying it and removing the obstacles that prevented its use, but no firm conclusion has been reached.

The Governing Body is to continue its examination of various possible ways to strengthen ILO supervisory procedures by, *inter alia*, drawing on the experience of the freedom of association procedure in relation to the observance of the ILO principles on nondiscrimination and forced labor. It was also to examine whether a standing tripartite body, similar to the Committee on Freedom of Association, should be established to handle representations and complaints under Articles 24 and 26 of the ILO Constitution. Such an innovation would be intended to reduce the sporadic nature of deliberations typical of ad hoc bodies and to improve the consistency of treatment of representations and complaints by eventually developing a uniform body of case law.[80]

Direct Contacts

Although it is not strictly speaking a supervisory procedure, mention should also be made of the so-called *direct contacts* procedure.[81] This procedure was officially introduced in 1968 and revised in 1973.[82] Since the mid-1970s direct contacts have also been resorted to in connection with cases of alleged violations of trade union rights under examination by the Committee on Freedom of Association.[83]

The direct contacts procedure consists of on-site visits carried out in a Member State by a representative of the Director-General at the initiative or at least with the consent of the government concerned.[84] This procedure can be initiated

by the Committee of Experts, the Conference Committee, the Governing Body, or by the State involved.[85] This particular procedure was especially welcomed by those States that were to benefit from it. In fact, it has been initiated more frequently by governments than by the supervisory bodies.[86]

The majority of direct contacts have been undertaken by ILO officials, but in several instances (particularly when some technical or major policy issues were involved) they have been entrusted to an independent expert accompanied by an ILO official.[87] This procedure usually involves discussions with representatives of the government concerned and officials of various government services who have direct responsibility for the questions at issue. Depending on the nature of the case, they may also involve discussions with members of the judiciary or special bodies involved in the settlement of labor disputes, individual employers and workers, and recruiting agents.

It should be emphasized that the direct contacts procedure does not in any way replace or limit the responsibilities of the established supervisory bodies. Thus, where the request for direct contacts arises from comments by the Committee of Experts or the Conference Committee, it remains the responsibility of these Committees to examine, using the new information obtained through the direct contacts, the extent to which conformity has been secured concerning the obligations of the Member State involved. However, while these contacts are taking place, the supervisory bodies suspend their examinations of cases for a period normally not exceeding one year in order to take account of the outcome of these contacts.[88]

In practice, direct contacts have performed three functions.[89] In many instances they have constituted a form of technical assistance, providing advice to Member States on how to comply with the requirements under ILO conventions or on the regular procedure described in Article 22.[90] In some cases, direct contacts have involved fact-finding, which enables the Committee of Experts to reach its conclusions and submit its reports with due regard to all relevant considerations.[91] Finally, where major problems or conflicting views between a government and ILO supervisory bodies have existed, direct contacts have provided the opportunity for a more complete explanation of the considerations underlying the positions adopted by each party. Instead of public criticism by the supervisory bodies, quiet diplomacy can be given a limited period of time in which to work.[92] Direct contacts, in short, represent a highly flexible technique that, nonetheless, possesses serious potential for development.[93]

Some Lessons for Multilateral Environmental Agreements

The ILO is often considered to be effective in the protection of human rights. In recognition of its achievements, the ILO was awarded the Nobel Peace Prize in 1969. Such a remarkable achievement owes much to the ILO's ability to improve compliance with ILO commitments, namely, the implementation of ILO conventions. From 1964 to 1995, the supervisory bodies of the ILO registered 2,107 cases of progress, that is, instances where national legislation and practice were changed to meet the requirements of a ratified convention following reports by supervisory bodies.[94] Although this figure does not reveal those cases where States modified their legislation before or shortly after the ratification of a convention, it nevertheless reflects the deterrent value of supervision.[95]

Indeed, the existence of a supervisory system may discourage States from violating international standards; this holds for all international commitments, whether in the field of human rights, environment, trade, or disarmament. Yet, as in the environmental field, the cause-and-effect relationship in the area of human rights is difficult to measure. Too many factors influence progress in the field to make it possible to precisely document the role of international supervisory systems.[96]

Some scholars and the ILO itself have undertaken studies of the impact of ILO supervision.[97] Although these studies may lack precise mathematical proof, they nevertheless support the general view that the ILO supervisory system has been relatively successful. The reasons for this success are various and are still the subject of debate.[98]

The ILO and environmental regimes differ greatly in their aims, structure, and historical development. Lessons cannot easily be transferred from one to another. Keeping this in mind, an attempt will be made to determine which characteristics of the ILO supervisory system are applicable to international environmental regimes.[99]

Evolutionary System

It should be stressed that the ILO compliance monitoring system is evolutionary.[100] Its growth over the years, as it has worked to enhance its effectiveness, bears witness to the vitality of the system. Efforts have been made to streamline the reporting system; to promote more direct dialogue with Member States, both individually and at the regional level; and to tap the knowledge and experience of employers and workers in support of national and international measures to implement ILO standards.[101] Thus, the system has evolved to its present state on the basis of the demand for effective supervision. Moreover, additional supervisory procedures, especially the more confrontational ad hoc procedures, were added only as Member States had experience with supervision and gained confidence in it over time.

Some environmental regimes are also evolutionary, or at least have this potential.[102] Their constituent instruments contain all the necessary provisions to allow them to evolve over time in order to react to new scientific certainties.[103] However, although both the ILO system and these environmental regimes are endowed with comparable provisions for flexibility, they do not have, nor could have, comparable histories. The ILO has evolved over almost 80 years. It has withstood the tensions of a sharply bipolar world in which different conceptions of human rights, among other conflicts, have played a key role.

Concerning the issue of supervisory procedures more specifically, it should be stressed that instances of supervisory mechanisms in multilateral environmental treaties are quite rare, and cases of evolutionary supervisory procedures in this particular area are even scarcer. Among these few instances, the Convention on International Trade in Endangered Species (CITES) stands out for its capacity to grow and adapt. Over the more than 20 years it has been in existence CITES has developed an elaborate, comprehensive, and, to a certain extent, effective system of supervision starting from a few sketchy provisions on the Conference of the Parties and the Secretariat.[104] Currently, the Secretariat and the Parties, consider more than 100 cases of alleged violations annually.[105] Within this remarkably elaborate system of supervision, non-State actors play a major role by analyzing and managing data on trade of wildlife specimens and identifying areas of inadequate implementation.

Yet, as the ILO experience teaches, time is a critical element when judging the flexibility of international regimes. This is why, beyond any legal evaluation of the constituent instruments, it is impossible to definitively evaluate the actual ability of recent environmental regimes to evolve over time. However, the ILO

experience indicates that with time and constructive attention, supervisory systems can become more effective, even from modest beginnings.

Consistency in Development

Although ILO supervisory procedures have undergone changes and adaptations, the essential principles underlying these procedures, which are aimed at ensuring impartial assessments and confidence in their objectivity, have been fully maintained.[106] After 77 years of constant development, the ILO Constitution remains the fundamental juridical instrument for all of the ILO's supervisory machinery. Therefore, the same supervisory system is valid for all ILO conventions and is legally binding for all Member States; the authority of the entire system flows from a single source.[107] Although the ILO has adopted a considerable number of conventions and recommendations, it has a single system of supervision that applies to all of them, with the notable exception of the specialized Committee on Freedom of Association. Compared with an alternative system of fragmented supervision tailored to specific commitments and legal instruments, the unity of the ILO system has probably streamlined the overall procedure, reduced costs, and increased the overall effectiveness of the system.

The ILO supervisory system is a cohesive structure that employs a wide array of measures, all designed to persistently pressure States to comply with their obligations. The various measures are interrelated and are integrated into the work of the ILO as a whole. Thus, the main lesson is that, whereas carefully negotiated regimes can enjoy the benefit of a coherent normative system over time, framework conventions risk engendering erratic growth of functions, competencies, and contradictory aims of the regime's organs. More specifically, in the case of the Framework Convention on Climate Change, the fast-paced process of negotiating an agreement in time for the UN Conference on the Environment and Development (UNCED) left the Conference of the Parties with many unresolved issues related to the design and operation of the Convention's institutions. The costs of this hurrying in terms of increased intricacy and bureaucracy of both the negotiating process after Berlin and the future functioning of the Convention are not yet clear. The risk is the loss of a coherent and efficient set of institutions, negotiated in parallel with the Convention's commitments and Protocols. Therefore, although much attention is now focused on the development of Protocols, the ILO experience strongly suggests that regime institutions should be developed with as much of a common and consistent core as possible.

Techniques of Dispute Settlement and Enforcement

The ILO system comprises many existing techniques for dispute avoidance and settlement, ranging from diplomatic to quasi-judicial and judicial means. Recently, the Director-General of the ILO proposed enlarging the set of means available to include permanent access to mediation and voluntary arbitration.[108] Such a wide choice of means and the possibility of their coordinated use are among the most important features of the ILO system. Specifically, the combined use of diplomacy and censure over time has proved fairly effective.[109] On the one hand, publicity is given to reports drawn up by the supervisory bodies and the related discussions at international meetings; on the other hand, the ILO makes contacts with governments and employers and workers organizations. In this context, publicity plays a key role. It facilitates collective review and mutual accountability by all Member States and even more importantly it exposes government reports to public scrutiny through non-State actors.[110]

Another lesson from the ILO experience is that, in the most difficult cases, noncomplying States can be brought back into compliance only through broad, concerted international action that is not limited to those measures provided by one specific regime. As the case of the Commission of Inquiry established for investigating Poland's violation of the freedom of association conventions shows, States that are determined not to comply cannot be forced to comply by the diplomatic sanctions envisaged in the ILO system. If Poland was ultimately brought back into compliance, it was probably not the direct result of any specific ILO action. Yet, it is undeniable that international pressure to end human rights violations in Eastern Europe, which was catalyzed in part by ILO actions, played a role in Poland's ultimate compliance.

Since the beginning of the 1990s, multilateral environmental treaties have usually contained detailed provisions on a wide array of dispute settlement means ranging from mere negotiations to conciliation or judicial settlement, through an arbitral tribunal or the ICJ. This is the case, for example, for the Protocol on Environmental Protection to the Antarctic Treaty, the Rio Conventions (the Framework Convention on Climate Change and the United Nations Convention on Biological Diversity), the Desertification Convention, the United Nations Economic Commission for Europe Conventions (Convention on Environmental Impact Assessment in a Transboundary Context, the Convention on the Transboundary Effects of Industrial Accidents, and the Convention on the Protection and Use of Transboundary Watercourses and International Lakes), the Convention on the Protection of the Baltic Sea Area, and the North-East Atlantic Convention.[111]

To date, the dispute settlement procedures in multilateral environmental treaties have never actually been used. Yet this does not reduce their important deterrent value. The fact that they have never been used is partially explained by the observation that almost no State has an environmental record so clean that it can afford to criticize another State without fear of a counterclaim. However, whereas States may fear counterclaims, NGOs, and perhaps also international organizations, do not.[112] This could be a further argument in favor of a stronger role for non-State entities in compliance monitoring and enforcement procedures.

A System of Supervision

The system of national reports and the ability to use these reports to compare legislation and practice with ILO standards is the backbone of the ILO supervisory system. The reports are the starting point for the regular procedure of supervision, which is where most of the supervisory work takes place. Among the different procedures available, the regular supervisory procedure has achieved the greatest results and probably will continue to be at the core of the ILO's supervisory system.[113] By preventing disputes, the regular supervisory procedures fulfill the general purpose of enhancing compliance with international obligations. In fact, the ultimate goal of control procedures in general, and of the ILO procedures in particular, is to make comments designed to encourage dialogue and cooperation and to help states to get back into compliance, rather than to allocate blame and criticism.[114]

One of the greatest assets of the ILO supervisory machinery is that it offers a continuum of procedures, from the regular to the ad hoc systems.[115] The joining of regular and ad hoc procedures is not completely unknown in environmental treaties.[116] Yet, despite the potentially relevant role of ad hoc procedures, for the above mentioned reasons, the procedures available under Articles 24 to 34 of the ILO Constitution (e.g., use of commissions of inquiry) and the special freedom of association procedure will probably remain reserve mechanisms used only in a limited number of cases, particularly when fact-finding is required.[117] Still, the mere existence of these procedures could play a deterrent role, providing added inducement to respond to routine supervision.[118]

Several multilateral environmental treaties contain provisions for the establishment of regular review procedures that are similar to the ILO regular procedure in many respects.[119] Yet, the ILO supervisory system has gone one step beyond by creating a detailed procedure for handling issues and questions that arise from national reports.[120] The ability to handle such specific issues has contributed

to the effectiveness of ILO supervision. This suggests that environmental treaties in general, and those that provide for the establishment of noncompliance procedures in particular, should necessarily develop a procedure to effectively identify and address the many compliance issues that arise during the regular review of national reports.

Finally, it should be stressed that one of the main advantages of endowing a regime with supervisory procedures that deal systematically with compliance by Member States is that information from the supervisory process can be used to adjust the regime standards over time. Knowing why States fail to comply is helpful for creating standards that are less likely to be violated.

Particular Nature of Supervised Norms

Flexibility of Norms

The reasons for the ILO's high degree of effectiveness relate not only to the flexibility of its supervisory procedure, but also to the particular features of the norms whose implementation is monitored. Indeed, it must be remembered that ILO instruments basically set minimum standards.[121] In other words, ILO conventions merely set the general framework. The desire for flexibility in the framing of international labor conventions has been reflected in the Constitution since 1919 and has prompted many of the flexibility clauses included in ILO conventions [for example, the possibility of opting for one or several parts of a convention; limiting the scope of a convention either with regard to certain categories of individuals or enterprises (*ratione personae*) or with regard to the territory (*ratione territorii*); and choosing between different techniques of protection and application].[122] This is particularly so for the more technical standards.

Most of the recent multilateral environmental treaties do not have comparable flexibility. Since the United Nations Convention on the Law of the Sea in 1982, multilateral environmental treaties have increasingly adopted the practice of creating a "package deal," therefore excluding reservations.[123] Usually, the rationale for such rigidity is found in the observation that, as a general rule, environmental treaties concern matters common to all parties. Therefore, their common application to all Member States is considered to be a basic requirement. Yet such an argument holds for ILO conventions, too. As the ILO experience proves, allowing some flexibility can bring wider acceptance of quite stringent standards. This could be a good compromise between treaties with stringent commitments but low ratification rates (for example, some MARPOL annexes) and "loose" conventions with universal acceptance (for example, the Framework

Convention on Climate Change). The balance point may vary considerably in different treaties, thus making it difficult to infer from the ILO experience any general rule applicable to all environmental treaties. Yet it is undeniable that some flexibility could promote wider acceptance of stringent international obligations.

Consensus on Norms

The International Labour Conference adopts conventions and recommendations. Selected subjects are placed on the agenda of the Conference by the decision of the Governing Body.[124] The technical preparation that precedes and accompanies the framing of ILO standards helps to ensure that an international instrument will only be adopted once its subject matter has reached a sufficient degree of development and is considered important. By the time they come into being, ILO standards usually have already achieved a high degree of consensus, partly because they need a two-thirds majority to be adopted by the Conference, and partly because government, employers, and workers delegates participate actively in the work.[125] However, this is no guarantee of wide ratification.

To summarize, the ILO experience shows that a high degree of consensus and flexibility in how conventions can be applied might help to ensure high overall impact of a standard.

Particular Features of ILO Committees on Implementation

Limited Membership Committees

The ILO Committees and Commissions that supervise the implementation of standards illustrate the benefits of delegating such functions to small, specialized bodies. This suggests that when parties to multilateral environmental treaties want such functions to be performed, they should create specialized committees to perform them rather than give the responsibility to much larger bodies with already crowded agendas and large, open-ended membership. Restricted committees for reviewing the implementation of commitments are quite rare in multilateral environmental agreements. Although the Implementation Committee of the Montreal Protocol and the Implementation Committee of the Oslo Protocol have a restricted membership (10 and 8 members, respectively), the Subsidiary Body on Implementation of the Framework Convention on Climate Change, the Committee for Environmental Protection of the Protocol on Environmental Protection of the Antarctic Treaty, and the Commission of the North-East Atlantic Treaty, just to name a few, are open-ended.[126]

Moreover, the influence and effectiveness of the small ILO Committee of Experts and the larger but standing Conference Committee derive from their ability to serve as legitimate forums for raising, debating, and resolving issues. Most issues are disposed of in these bodies under the regular procedures for supervision, leaving only the most difficult questions for debate in the larger, politically oriented International Labour Conference or for referral to the ad hoc procedures.

Balance between Technical and Political Bodies

The division of functions between the Committee of Experts and the Conference Committee has been another key to the success of the ILO supervisory system. The expert body is composed of individuals chosen for their independence and competence. The representative bodies, where the decision-making authority ultimately lies, comprise representatives of governments, workers, and employers. The equilibrium between the technical and political bodies makes it possible to maintain a desirable balance in the treatment of cases. In this sense, the role assigned to employers and workers organizations, both in the framing of international standards and in the control of their implementation, is a particularly important factor in maintaining the dynamism of ILO supervision.[127]

The noncompliance procedures of the Montreal and the Oslo Protocols, though also characterized by a two-step approach, do not maintain the same division between technical and political bodies. In fact, their Implementation Committees, like the Subsidiary Body on Implementation of the Framework Convention on Climate Change, the Commission of the North-East Atlantic Treaty, and the Committee for Environmental Protection of the Protocol on Environmental Protection of the Antarctic Treaty, are composed of Member States and not independent experts.[128]

Active Role of the International Labour Office

The ILO experience shows that the effective work of supervisory bodies is heavily dependent on assistance from the secretariat. For instance, in 1995 the Committee of Experts was supposed to review 2,290 detailed reports during its three-week session. The International Labour Office has provided the necessary resources to develop a large and competent staff within the International Labour Department to support the work of the supervisory organs.

The preparatory work of the Committee of Experts is carried out by some 40 officials in the International Labour Standards Department. Among their other

tasks, the ILO officials examine each State's report. If a discrepancy is believed to exist between the convention at issue and national law and practice, the ILO officials draft a comment for submission to the member of the Committee of Experts responsible for that particular convention. The Expert can accept the comments as drafted or make whatever changes are considered necessary. The draft comments as approved or modified by the Expert are then presented to the whole Committee for approval.

Considering the immense work load of supervisory bodies, the number of ILO personnel devoted to the supervisory procedure is relatively small, amounting to an estimated 5% of the whole organization. Yet supervision is a core function on which much of ILO's effectiveness depends. The costs of supervision appear remarkably low in comparison with those of the other functions of developing and maintaining legal regimes. Furthermore, because of the economies of scale in building an integrated supervisory system, increasing the number of obligations to be supervised may be accompanied by declining marginal costs of such activities. Therefore, according to the ILO experience, reluctance to develop supervisory procedures because of the financial costs does not appear to be justified.

Participation of Non-State Actors

The ILO is probably the only international organization in existence that is open to all States and that gives non-State actors a full standing on an equal footing with States.[129] Non-State actors have equal representation in the plenary organ (the International Labour Conference) and in the executive organ (the Governing Body). They can initiate all ad hoc procedures and participate in all major ILO committees, notably the Conference Committee. The main exception to the full standing of non-State actors in the ILO system is the Financial Committee of the Conference, which manages the ILO's budget.[130] However, considering that only States contribute financially to the Organization's budget, excluding non-State actors from this committee is still compatible with the ILO's tripartite spirit.

Non-State actors are allowed to play a key role in the supervisory procedure, primarily because they play a role in the adoption of the international standards whose implementation is to be monitored. This suggests that it could be politically awkward to involve non-State actors in systems of supervision on an equal footing with States if they were not fully involved in shaping and adopting those commitments whose implementation is monitored. This lesson from the ILO experience might encourage future environmental regimes to allow non-State actors

a greater role in their functioning. However, it also suggests that existing regimes should carefully consider enlarging participation once they have started working at full capacity.

ILO practice shows that non-State entities play a key role in the functioning of the ILO supervisory system. One hundred twenty-one of 159 observations under the regular procedure, 6 of 9 cases before ILO commissions of inquiry, and fairly all representations and cases under the freedom of association procedure were initiated by non-State actors.[131] Therefore, it is not rash to assert that if non-State entities were not granted a role in the ILO compliance control mechanism the entire system of supervision probably would be nearly ineffective and obsolete. Notably, non-State actors have made major contributions by commenting on government reports, providing the debate within the ILO with precious factual information. Workers associations, in particular, have the best firsthand information and the strongest direct incentives to pursue violations of ILO conventions. This explains why such groups have initiated the great majority of cases under the ad hoc procedures. Moreover, their participation tends to depoliticize the system of supervision.[132]

These particular lessons from the ILO experience should be applied to other regimes with due caution. Even within the domain of the international protection of human rights, direct participation of non-State actors within the regime's institutions is still quite limited. The main exception is the Additional Protocol to the European Social Charter, signed on 9 November 1995, which would introduce a system for complaints that is similar to, though more open than, the system existing in the ILO.[133]

Since its founding in 1919, the ILO, because of its philosophy and the foresight of one of its founders and first Director-General, Albert Thomas, has given a legitimate and formal place to workers and employers associations.[134] Their participation was conceived to be and, as has been shown, is still essential to the effectiveness of international labor standards. Multilateral environmental agreements, however, generally do not have the same integral connection with non-State actors, although such actors might play a major role in putting environmental issues on the agenda and creating public pressure for action or, as in the case of CITES, play a major operational role in monitoring compliance and providing expert advice.

One reason for this widespread wariness of full participation of non-State actors in the supervision of the implementation of international commitments is the potentially enormous number of "complainants." During the past decade, the number of NGOs, environmental NGOs in particular, has increased remarkably.[135] Undeniably, the ILO could potentially face an equally large number

of non-State actors and consequently see its supervisory bodies flooded by applicants. Yet, this has not happened. The ILO has effectively managed the problem by limiting access to procedures. For instance, access to the freedom of association procedure is limited to genuine workers associations and is denied to temporary bodies such as strike committees. Moreover, the associations must be either national trade unions with a direct interest at stake; international trade secretariats, if the issue affects one of their affiliates; or one of the international trade union confederations having consultative status with the ILO.[136] Finally, whereas other human rights regimes allow individuals to file complaints (for example, the European Court of Human Rights), the ILO system does not.

The full participation of non-State actors in the ILO is restricted to representatives of employers and workers organizations. Within the ILO, workers organizations play an extremely active role, but their concerns are not always the same as those of human rights NGOs. The major human rights NGOs (for example, Amnesty International, the International Commission of Jurists, and Anti-Slavery International) are significantly less involved in ILO activities than in other human rights regimes. They do not lobby in the corridors at ILO meetings and the ILO does not sufficiently encourage information from, consultation with, and participation by such groups. Because they cannot play an active role within the highly formalized procedures of the ILO, human rights organizations have generally shown little interest in the Organization.

To summarize, as the ILO case shows, granting full standing within an organization to all stakeholders and allowing non-State actors to have standing in compliance control procedures, though limited in some way, could enhance the implementation of international commitments. Moreover, the ILO has reached a good compromise between universal access and overall exclusion of non-State actors, which with changes could be applied to multilateral environmental treaties. The States' die-hard wariness of non-State actors, therefore, cannot be justified in light of the results achieved in the ILO experience provided that full implementation of commitments is a fundamental interest of States.

A Continuous Flow of Information

The ILO is characterized by a continuous and free flow of information from non-State entities and States to the ILO, and from the ILO to States and non-State entities. Special rules have been adopted requiring governments to circulate reports and other official ILO documents to employers and workers groups in their countries for the purpose of soliciting their observations, improving the

flow of information, and making it easier for those groups to participate on a well-informed basis.[137]

This constant dialogue on the shaping of standards and their content, and on the implementation of commitments between all stakeholders helps to prevent disputes or to have them addressed at an early stage by calling attention to cases of noncompliance. Moreover, acquainting NGOs with the framing of standards may, over time, reduce the number of cases brought before supervisory organs.

The direct involvement of non-State actors in settling international obligations might play a key role in enhancing the effectiveness of the whole system. As the experience of the ozone regime illustrates, environmental decisions often have an enormous impact on the business community. Widespread consultation with industry might therefore be necessary, both to provide factual information about the problem and to work out the practical difficulties of compliance.[138]

Technical Assistance

Efforts to increase confidence in ILO supervision have included providing assistance to Member States in order to implement ILO standards. The ILO pursues an active partnership policy that involves working closely with all three constituents in each country in order to ensure that national objectives are identified and served in terms of both labor standards and technical cooperation.[139] These procedures are, by their very nature, extremely flexible and appear to possess considerable growth potential.

The ILO works directly in the field to provide explanations, advice, and assistance on matters related to the supervision of commitments. It posts advisers on international labor standards in regional offices and organizes seminars and regional reviews of conventions.[140] These services are offered in response to specific requests received from governments or from workers or employers organizations, as well as through routine advisory missions and informal discussions initiated by the Office. Technical assistance is an inducement for States to be more receptive to the standard-setting work of the ILO. However, its impact on the implementation record of ILO standards cannot be easily assessed. Indeed, the withdrawal of technical assistance has not yet been used by the ILO as a sanction for failure to implement labor standards; the Governing Body has indeed rejected suggestions to do so.[141]

Some multilateral environmental agreements also provide for the supply of technical assistance. For example, the Convention on Biological Diversity and the Framework Convention on Climate Change impose a general duty on Member

States for the promotion of research, training, public education, and general awareness.[142] Because these conventions are relatively new, however, it is still impossible to draw any meaningful conclusion about their actual capacity to implement these provisions. To a large extent, this ability will depend on the financial resources that Member States provide within the context of the regime. Yet, the ILO experience clearly indicates the way multilateral environmental regimes must go if they want to meaningfully improve their implementation record. In the long run, the actions of an environmentally aware public are the only effective means to address environmental problems. Still, the relatively limited role non-State actors can play in existing environmental regimes significantly reduces the extent to which this ILO experience can be borrowed.

On-Site Visits

The direct contacts procedure is more formal than the provision of technical assistance. It is essentially a means for dialogue between the ILO and Member States, for advice, and, in certain cases, even for investigation and conciliation. More specifically, under the direct contacts procedure problems affecting the ratification or implementation of conventions or the discharge of related obligations by a Member State can be examined by a representative of the ILO Director-General and representatives of the State concerned. Admittedly, if governments have increasingly accepted visits from ILO commissions or representatives, it is largely because of the objectivity and impartiality of their work.[143] It might be also due to the benefits that can be derived from the findings and recommendations of an independent and impartial body of observers; to the opportunity such visits provide for refuting unjustified accusations; to the desire not to appear to implicitly accept the charges made against them by rejecting the inquiry; and to the weight of national and international opinion.[144]

The Framework Convention on Climate Change has developed a somewhat similar procedure of “country visits,” which so far has been quite successful.[145] Similarly, the aim of the Climate Change “review teams” is to assess the level of implementation of States’ commitments by holding a series of discussions with the government team that worked on the national report (“communication” in the Climate Change jargon). Moreover, review teams also meet with representatives of environmental and business NGOs and the scientific and technical community, which provide their own reports to the review teams. As in the case of the ILO, the country visits have generated great interest within the host countries

and have helped to spread information on measures, insights, innovations, and methodologies at all levels.

On-site visits may help to build confidence in the whole process of implementation and supervision, which ultimately will lead to better cooperation and openness toward country visits. Hopefully, Climate Change country visits will follow the ILO example and develop beyond the mere monitoring function to become a part of a continuous source of technical advice to ensure that national commitments are identified and served in terms of both reduction measures and technical cooperation.

Slowness

ILO supervisory procedures, despite their praiseworthy flexibility, are not able to rapidly overcome serious discrepancies in the application of ratified conventions.[146] For instance, the average length of time between the filing of a complaint under Article 26 of the ILO Constitution and its disposal is three years. The reason for this slowness is that the ILO supervisory system consists, in general, of a two-tiered examination of cases, first by a technical body and then by a political body, where the decision-making power ultimately rests. An ad hoc technical body can operate constantly, but the political bodies usually meet at fixed dates: the Governing Body in regular session twice a year and the International Labour Conference once a year. The main exception to this drawback of the ILO supervisory system is the direct contacts procedure, which can be at any time but nevertheless has only limited effectiveness.

The Committee on Freedom of Association, which meets three times a year, has developed a special procedure for dealing with urgent cases. These are cases “involving human life or personal freedom, or new or changing conditions affecting the freedom of action of a trade union movement as a whole, and cases arising out of a continuing state of emergency and cases involving the dissolution of an organization.”[147] The Committee gives priority to such cases and makes a special request to the government involved to give a particularly rapid reply to the allegations. Yet, even many urgent cases seem to require an extremely long period for consideration by the Committee on Freedom of Association.[148]

Undoubtedly, the strongest weapons of the ILO supervisory system are perseverance and patience. Year after year, the ILO Governing Body continues to point out instances of noncompliance until the cases are satisfactorily resolved. For instance, in the case of Chile’s noncompliance with the freedom of association

obligations, from 1975 until 1990, without interruption, the Governing Body urged the Chilean government to amend its legislation.

Yet, because of the characteristics of environmental problems (which are often from non-point sources and which are cumulative and cause irreversible damage) and because of the need in some cases to give swift answers to possible environmental emergencies, multilateral environmental treaties must develop procedures that can rapidly identify and address cases of noncompliance by Member States. Constant noncompliance with environmental obligations over long periods of time by a few States might, ultimately, offset the efforts of the majority of States. Therefore, whereas in the field of international protection of human rights time is a precious, and sometimes the only, ally, in the protection of the environment it represents a major handicap.

The frequent sluggishness experienced with multilateral environmental treaties could be partly compensated for by including provisions concerning interim measures to be taken while a case is pending before the organs charged with monitoring the implementation of the convention or the settlement of disputes. However, despite their undeniable usefulness, such provisions are still quite rare in multilateral environmental treaties. Among the few instances, one might recall the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas and the more recent 1982 Convention on the Law of the Sea and 1995 Straddling Fish Stocks Agreement.[149]

References and Notes

- [1] See International Labour Organization, *Constitution of the International Labour Organization and Standing Orders of the International Labour Conference* (Preamble), International Labour Office, Geneva, Switzerland, December 1994.
- [2] See International Labour Organization, *Declaration Concerning the Aims and Purposes of the International Labour Organization* (point II), annex to the ILO Constitution.
- [3] See *Constitution of the International Labour Organization*, (Preamble).
- [4] "The term 'international labor standards' commonly refers to the international legal instruments drawn up by the ILO, in other words, the Conventions and the Recommendations." See International Labour Organization, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, International Labour Office, Geneva, Switzerland, 1994, at p. 9.
- [5] See International Labour Organization, *Report of the Committee of Experts* (hereafter, *Report*), International Labour Office, Geneva, Switzerland, 1996, at par. 10 and 14.

- [6] Valticos argues that the support for supervision might be weaker now that this criticism has disappeared. See Valticos, N., Once more about the ILO system of supervision: In what respect is it still a model? in N. Blokker and S. Muller, eds., *Towards More Effective Supervision by International Organizations*, Nijhoff, Dordrecht, Netherlands, 1994, pp. 99–113, at p. 112; Valticos, N., Les conventions de l'Organisation internationale du travail à la croisée des anniversaires, *Revue générale de droit international public*, 1996, vol. 100, pp. 5–43. For an analysis of the criticism of the ILO compliance monitoring system during the 1970s and the 1980s, see Ghebali, V.Y., *The International Labour Organization: A Case Study on the Evolution of UN Specialized Agencies*, Nijhoff, Dordrecht, Netherlands, 1989, pp. 229–231.
- [7] See Valticos, Once more about the ILO system of supervision, op. cit. at p. 112.
- [8] Member States to the United Nations Framework Convention on Climate Change are called, under Article 13, to create a “multilateral consultative process for the resolution of questions regarding the implementation of the Convention.” The Conference of the Parties of the Climate Change Convention held its first session in Berlin from 28 March to 7 April 1995. At this session, decision 20/CP.1 (FCCC/CP/1995/7/Add.1) established an ad hoc open-ended working group of technical and legal experts to study all issues related to the establishment and design of a multilateral consultative process. Among other systems of supervision set up by international organizations and treaties, they decided to give particular attention to the ILO compliance monitoring system. On this point, see Intergovernmental Negotiating Committee for a Framework Convention on Climate Change, *Consideration of the Establishment of a Multilateral Consultative Process for the Resolution of Questions Regarding Implementation (Article 13)* UN Doc. A/AC.237/59; *Consideration of the Establishment of a Multilateral Consultative Process for the Resolution of Questions Regarding Implementation (Article 13): A Review of Selected Noncompliance, Dispute Resolution and Implementation Review Procedures*. Note by the Secretariat, UN Doc. FCCC/CP/1995/Misc.2.
- [9] See Valticos, N., Les commissions d'enquête de l'Organisation internationale du travail, *Revue générale de droit international public*, July–September 1987, vol. 91, no. 3, pp. 847–879, at p. 848.
- [10] On the control of implementation of international commitments in general, see Kaasik, N., *Le contrôle en droit international*, Pedone, Paris, France, 1933; Kopelmanas, L., Le contrôle international, *Hague Academy of International Law, Collected Courses*, 1950–II, pp. 59–149; Hahn, H.J., Internationale Kontrollen. Ein Beitrag zum Begriff und Bereich der Aufsicht im Friedenvölkerrecht, *Archiv des Völkerrechts*, 1958, pp. 88–112; Van Asbeck, F.M., Quelques aspects du contrôle international non judiciaire de l'application par les gouvernements des conventions internationales, *Nederlands Tijdschrift voor Internationaal Recht, volume en honneur de J.P.A. François*, Leyden, 1959, p. 27 ff; Merle, M., Le contrôle exercé par les organisations internationales sur les activités des États membres, *Annuaire français de droit international (AFDI)*, 1959, pp. 411–431; Golsong, H., Implementation of international protection of human rights, *Hague Academy of International*

Law, Collected Courses, 1963–II, pp. 7–151; Zanghì, C., *La funzione di controllo negli enti internazionali*, Giuffrè, Milan, Italy, 1966; Charpentier, J., *Le contrôle par les organisations internationales de l'exécution des obligations des Etats*, *Hague Academy of International Law, Collected Courses*, 1983–IV, pp. 143–245; Butler, W.E., *Control over Compliance in International Law. Anglo-Soviet Symposium on Public International Law*, Nijhoff, Dordrecht, Netherlands, 1990.

On the compliance control system of the ILO in particular, see Zarras, J., *Le contrôle de l'application des conventions internationales du travail*, Librairie du Recueil Sirey, Paris, France, 1937; Berthoud, P., *Le contrôle international de l'exécution des conventions collectives*, Imprimerie de Saint Gervais, Geneva, Switzerland, 1946; Valticos, N., *Un système de contrôle international: la mise en oeuvre des conventions internationales du travail*, *Hague Academy of International Law, Collected Courses*, 1968–I, pp. 311–407.

- [11] See *Constitution of the International Labour Organization* (Articles 19–34).
- [12] On the history of the evolution of the ILO compliance monitoring system, see Valticos, N., *L'évolution du système de contrôle de l'Organisation internationale du travail*, *Le droit international à l'heure de sa codification, Études en l'honneur de Roberto Ago*, Giuffrè, Milan, Italy, 1987, pp. 505–521.
- [13] Such a solution was not envisaged by the ILO Constitution itself; Article 23(1) of the ILO Constitution merely states that “The Director-General shall lay before the next meeting of the Conference a summary of the information and reports communicated to him by Members in pursuance of articles 19 and 22.” The Director-General carried out this duty until 1925.
- [14] See *Constitution of the International Labour Organization*, [Article 19(5)(d)].
- [15] In 1994, in the reports due under Articles 19 and 22, all Member States to ILO conventions indicated the workers and employers organizations to which they sent copies of their reports. See *Report*, 1995, at par. 76.
- [16] See *Report*, 1996, at par. 78.
- [17] See *Report*, 1995, at par. 79.
- [18] See *Report*, 1996, at par. 80.
- [19] See Landy, E.A., *The Effectiveness of International Supervision*, Stevens and Sons, London, UK, 1966, at p. 19.
- [20] On the key role played by the Committee of Experts in the ILO compliance monitoring system, see Cornil, P., *Le rôle de la commission d'experts de l'O.I.T. dans le contrôle de l'application des conventions internationales du travail*, in *Revue belge de droit international*, vol. 6, 1970, pp. 265–277.
- [21] See Landy, *The Effectiveness of International Supervision*, op. cit., at p. 23.
- [22] See Valticos, *Once more about the ILO system of supervision*, op. cit., at p. 102.
- [23] There was also a fourth minor adjustment in 1979; according to this change, if a State ratifies a convention that introduces more stringent standards than a precedent convention on the same issue, the State is obliged to submit a report only on the more recent instrument. For additional information on the three procedure reviews, see GB 142/205 (1959); GB 210/14/32 (1976); GB 258/LILS/6/1 (1993).
- [24] The 1993 adjustment was first applied in 1995. See GB 258/6/19.

- [25] That Member States have not simply terminated these conventions by, for instance, a resolution of the International Labour Conference adopted by consensus is explained by the fact that the ILO Constitution does not yet provide for this. The possible adoption of an amendment to permit termination is under discussion. See International Labour Organization, Governing Body, *Report of the Committee on Legal Issues and International Labour Standards*, GB. 265/8/2, Geneva, Switzerland, March 1996. The termination of conventions on the international level would also require revision of the domestic legislation adopted to implement these conventions. New intervention by the legislative power is, therefore, required to abrogate this domestic law. Given the great load of work of modern legislative bodies, this does not seem to be a viable option.
- [26] Some 480 reports, due for those conventions applicable to nonmetropolitan territories, should be added to this figure. See *Report*, 1995, at par. 88.
- [27] In 1994 this figure was 68.7%. See *Report*, 1995, at par. 86 and 87.
- [28] See Leary, V.A., Lessons from the experience of the International Labour Organization, in P. Alston, ed., *The United Nations and Human Rights*, Clarendon Press, Oxford, UK, 1992, pp. XII–765, at p. 597.
- [29] Article 7 of the Standing Orders, annex to the ILO Constitution.
- [30] Article 65 of the Standing Orders, annex to the ILO Constitution. (Under Article 57 of the Standing Orders, the Committee elects the Chair, two Vice-Chairs, and one Rapporteur from among each of the three groups.)
- [31] As of 1957, the Committee of Experts has adopted the practice of using a “special list” to bring to the Conference’s attention cases where governments met serious difficulties in discharging their obligations. See International Labour Organization, *Record of Proceedings, International Labour Conference*, International Labour Office, Geneva, Switzerland, 1957, at p. 657, par. 30. For more information about the Committee’s role, see International Labour Organization, *Handbook of Procedures Relating to International Labour Conventions and Recommendations*, International Labour Office, Geneva, Switzerland, 1995, par. 58.
- [32] In a few cases concerning comments during the 1980s on the legislation of East European countries, members from Poland and the USSR dissented from the Committee’s findings. For more information on the effect of time constraints, see Adam, R., *Attività normativa e di controllo dell’ OIL ed evoluzione della comunità internazionale*, Giuffrè, Milan, Italy, 1993, at p. 145; and Landy, *The Effectiveness of International Supervision*, op. cit., at p. 51.
- [33] In 1974 the report was not approved because it highlighted the USSR’s failure to implement the Forced Labour Convention (No. 29) of 1930. In 1977, a controversy over the application of ILO conventions in the territories occupied by Israel was the primary factor behind the report’s not being adopted. In 1982, an issue involving the Conference Committee on Resolutions spilled over to the International Labour Conference and caused the absence of the necessary quorum. See Leary, op. cit., at p. 601.
- [34] See *Report*, 1995, at p. 78.
- [35] See *Report*, 1994, at p. 11.

- [36] See International Labour Organization, Standing Orders concerning the Procedure for the Examination of Representations under Articles 24 and 25 of the Constitution of the ILO (Article 3), adopted by the Governing Body at its 212th (March 1980) Session.
- [37] See *Constitution of the International Labour Organization*, (Article 25).
- [38] For an in-depth analysis of the ILO Inquiry Commission, see Llanos Mardones, H.I., *The International Labour Organization's Commission of Inquiry*, IUHEI, Memoire présenté en vue de l'obtention du Certificat d'Études Internationales, Geneva, Switzerland, 1990. For a case study, see Manin, A., La commission d'enquête de l'Organisation internationale du travail instituée pour examiner l'observation de la Convention no. 111 par la République Fédérale d'Allemagne: de nouveau enseignements?, *Annuaire Français de Droit International*, vol. 34, Éditions du CNRS, Paris, France, 1988, pp. 365–381.
- [39] When the ILO Constitution was being drafted at the Paris Peace Conference in 1919, a British proposal was made in which this condition of ratification by both parties did not exist. Instead, this proposal alluded to “any Convention.” This position almost prevailed, but finally the Drafting Committee replaced that phrase with “which both have ratified.” See Zarras, *op. cit.*, at p. 266.
- [40] To date, just two such Commissions have been appointed by decision of the Governing Body. The first case initiated by the executive organ occurred in 1974 against Chile; the second was in 1985 against the Federal Republic of Germany. It should also be stressed that in the case concerning the observance by the Dominican Republic and Haiti of the Conventions on Forced Labour (Nos. 29 and 105), on Freedom of Association and Protection of the Right to Organize (No. 87), and on the Right to Organize and Collective Bargaining (No. 98), filed by several Conference delegates, the Governing Body “. . . in the light of the allegations concerning malpractices in the payment of wages made in the complaint . . .,” by its own initiative decided that the Commission of Inquiry should also examine the observance by the Dominican Republic of the Protection of Wages Convention of 1949 (No. 95). See, International Labour Organization, Report of the Commission of Inquiry: Haiti and Dominican Republic, *ILO Official Bulletin*, Vol. LXVI, Special Supplement, 1983, par. 9.b. To date, five of nine complaints examined by a commission of inquiry have been initiated by a delegate to the Conference.
- [41] Some scholars have argued that international labor conventions not only bind States among themselves, but also legally bind each State to the Organization. See, Ørsted, H.C., Revisionen af de Internationale Arbejts Konventionen, *Nordisk Tidsskrift for international Ret*, vol. 2, 1931, pp. 3–20, at p. 14.
- [42] On the notion of “collective interests,” see Riphagen, W., State responsibility: New theories of obligation in interstate relations, in R.St.J. MacDonald and D.M. Johnston, eds., *The Structure and Process of International Law*, Nijhoff, The Hague, Netherlands, 1983, pp. 581–625, at p. 600; and Vadapalas, V., L'intérêt pour agir en responsabilité internationale, *Polish Yearbook of International Law*, vol. 20, 1993, pp. 17–35. On the applicability of the concept of “collective interest” in multilateral environmental treaties, see Sachariew, K., State responsibility for multilateral

treaty violations: Identifying the 'injured state' and its legal status, *Netherlands Yearbook of International Law*, vol. 35, 1988, pp. 273–289; and Charney, J.I., Third state remedies for environmental damage to the world's common spaces, in F. Francioni and T. Scovazzi, eds., *International Responsibility for Environmental Harm*, Graham and Trotman, London, UK, 1991, pp. 149–177.

- [43] Two other examples of treaties characterized by a multilateral structure of obligations are treaties in the field of disarmament and those on trade issues. However, these two particular categories of treaties can also have a strong bilateral component.
- [44] See Article 5(2)(e)(ii) of Part Two of the International Law Commission's Draft Articles on State Responsibility, as provisionally adopted, *Yearbook of the International Law Commission*, vol. II (Part II), 1985, at p. 25. Various commissions of inquiry of the ILO have underscored this point on several occasions. See, *inter alia*, International Labour Organization, Report of the Commission of Inquiry: Ghana–Portugal, *ILO Official Bulletin*, Vol. XLV, no. 2, Suppl. II, International Labour Office, Geneva, Switzerland, April 1962, p. 244; International Labour Organization, Report of the Commission of Inquiry: Portugal–Liberia, *ILO Official Bulletin*, Vol. LXVI, no. 2, Suppl. II, International Labour Office, Geneva, Switzerland, April 1963, p. 173. Judge Jessup, in his dissenting opinion in the South West Africa cases, quoted the ILO Commission of Inquiry on the Ghana–Portugal case, "The fact which this case establishes is that a State may have a legal interest in the observance, in the territories of another State, of general welfare treaty provisions . . ." It is, in short, a truly "... legal interest of States in general humanitarian causes . . ." See International Court of Justice, *South West Africa Cases*, Preliminary Objections (Ethiopia vs. South Africa; Liberia vs. South Africa), 21 December 1962, *ICJ Reports 1962*, pp. 425–428.
- [45] See Valticos, *Les Commissions d'enquête de l'Organisation internationale du travail*, op. cit., at pp. 860–861.
- [46] The manner in which the Governing Body communicates with the government concerned during this phase of the complaints procedure is similar to that described in the representation procedure (Articles 24 and 25).
- [47] Between 1960 and 1995 more than 20 complaints were filed. Only nine of the complaints were submitted by the Governing Body to a Commission of Inquiry; some of the other complaints were referred to the Committee on Freedom of Association instead, and for others a friendly settlement was secured, generally with the assistance of the ILO, as in the France–Panama cases and the Tunisia–Lybia case.
- [48] A closer examination to the composition of commissions of inquiry confirms the quasi-judicial character of ILO commissions of inquiry. Indeed, in the nine commissions of inquiry appointed so far, members included eight professors of law (four of whom were members of the Institute of International Law), seven members of the Permanent Court of Arbitration, and five judges or former judges of the ICJ. Moreover, some members have also been drawn from national judicial bodies, including several Chief Justices and a Lord of Appeal in Ordinary.

- [49] ILO Commissions of Inquiry have made on-site visits in cases concerning Portugal, Chile, the Dominican Republic and Haiti, the Federal Republic of Germany, and South Africa. In the complaint filed against the government of Poland, the refusal to cooperate prevented the Commission from making a scheduled on-site visit.
- [50] See, Report of the Commission of Inquiry appointed under Article 26 of the Constitution of the International Labour Organization to examine the complaint on the observance by Poland of the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), and the Right to Organize and Collective Bargaining Convention, 1949 (No. 98), presented by delegates at the 68th session of the International Labour Conference, *Official Bulletin*, ILO, Vol. LXVII, Special Supplement, 1984. See also Manin, A., Quelques réflexions sur la fonction de contrôle de l'O.I.T. (À propos du rapport sur la liberté syndicale en Pologne), *Annuaire Français de Droit International (AFDI)*, vol. 30, 1984, pp. 672–691.
- [51] See *Report of the Commission of Inquiry*, par. 470.
- [52] See International Labour Organization, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, General Report and Observations Concerning Particular Countries, 75th Session, International Labour Office, Geneva, Switzerland, 1998, at par. 7.a.
- [53] On the possibility of interpreting Article 29(2) as giving to any state the opportunity to bring the matter before the ICJ, see Adam, op. cit., at pp. 154–155, notes 44–46.
- [54] The two main exceptions are Poland and the Federal Republic of Germany.
- [55] Until the Constitution's revision in 1946, Articles 32 and 33 contained references to economic sanctions, which could be indicated either by the Commission of Inquiry or by the Permanent Court of International Justice.
- [56] In the case of the Dominican Republic and Haiti, it went as far as to recommend the conclusion of an agreement between the two states regulating the recruiting of workers in Haiti and the principal conditions of employment, which had to be publicized in full.
- [57] See Valticos, *Les commissions d'enquête de l'Organisation internationale du travail*, op. cit., at p. 857; and Adam, op. cit., at p. 150.
- [58] See Adam, op. cit., at p. 153. However, this is not the conclusion of Valticos. See Valticos, *Les Commissions d'enquête de l'Organisation internationale du travail*, op. cit., at p. 859.
- [59] See Cassese, A., *Il controllo internazionale*, Giuffrè, Milan, Italy, 1971, at p. 131ff; and Adam, op. cit., at p. 161, note 58.
- [60] See Adam, op. cit., at p. 161, note 58.
- [61] In fact, filing of claims has been rarely done by States. See Cornil, op. cit., at p. 267.
- [62] In 1934, the procedure was initiated by an Indian workers delegate with regard to an alleged violation of Convention No. 1 on Hours of Work in Industry (in this specific case, in the railways). However, the Indian government promptly engaged itself to comply with the Convention and the claim was discontinued. See International Labour Organization, *ILO Official Bulletin*, vol. 20, 1935, at p. 15. For an analysis of the reasons for the nonuse of the commissions of inquiry

during the first 40 years of the ILO, see Valticos, *Les Commissions d'enquête de l'Organisation internationale du travail*, op. cit., at pp. 849–851; Jenks, C.W., *The International Protection of Trade Union Freedom*, Stevens, London, UK, 1957, at p. 495 ff; and Ghebali, op. cit., at pp. 235–236.

- [63] These cases are Ghana against Portugal, filed in 1961; Portugal against Liberia, 1962; workers delegates against Greece, 1968; the International Labour Conference against Chile, 1974; workers delegates against Dominican Republic and Haiti, 1981; workers delegates against Poland, 1983; a workers NGO against the Federal Republic of Germany, 1985; International Labour Conference delegates against Romania, 1989; and International Labour Conference delegates against Nicaragua, 1989.
- [64] A complaint filed by the employees delegate of Sweden at the International Labour Conference in 1991 alleging nonobservance of Convention Nos. 87, 98, and 147 was, upon a decision of the Governing Body at its 262nd session (March–April 1995), not followed up. See *Report*, 1996.
- [65] The origins of the Commission of Inquiry established to investigate the alleged violation by the Federal Republic of Germany of the 1958 Convention on Discrimination (Employment and Occupation) can be traced to the particular environment of the Cold War. The task of the Commission was to examine whether or not there existed in the Federal Republic of Germany discriminatory practices on the basis of political opinion against public servants and persons seeking employment in the public service by virtue of the provisions concerning the duty of faithfulness to the free democratic basic order. These provisions were contained in a decree adopted by the Prime Minister of the Land on 28 January 1972; a common declaration with the Federal Chancellor; the judgment of the Federal Constitutional Court of 22 May 1975; and the principles for investigating loyalty to the national Constitution adopted on 19 May 1976.
- [66] On the freedom of association procedure in general, see Pouyat, A.J., The ILO's freedom of association standards and machinery: A summing up, *International Labour Review*, vol. 121, no. 3, May–June 1982, pp. 287–302.
- [67] See *ILO Official Bulletin*, vol. 33 III, 1950, at p. 86ff.
- [68] Sometimes cases are examined during two or more sessions.
- [69] According to Jenks, the obligation to grant freedom of association “has taken its place among the general principles of law recognized by civilized nations.” See Jenks, C.W., The international protection of trade unions rights, in E. Luard, ed., *The International Protection of Human Rights*, Thames and Hudson, London, UK, 1967, at p. 52.
- [70] Convention No. 87 on Freedom of Association and Protection of the Right to Organize, 1948; and Convention No. 98 on Right to Organize and Collective Bargaining, 1949. The importance of being able to apply the freedom of association procedures to States regardless of whether they have ratified the relevant conventions is somewhat reduced by the observation that the conventions on the freedom of association have received the highest number of ratifications so far. As of 31 December 1994, there were 112 ratifications for no. 87 on Freedom of Association and Protection

of the Right to Organize (1948), and 124 for no. 98 on Right to Organize and Collective Bargaining (1949). For a recent example of the application of this procedure to a State that was not a member of the ILO but was a member of the United Nations, see the complaint filed by the Congress of South Africa Trade Unions against South Africa. This claim has been transferred by the Governing Body to the United Nations Economic and Social Council; *Official Bulletin*, LXXI, 1988, Ser. A, at p. 153. Finally, it should be stressed that in the United Nations system of protection of human rights, there are other examples of procedures that do not depend on ratification of any convention by the State concerned. On this point see Valticos, Once more about the ILO system of supervision, *op. cit.*, at note 18.

- [71] See *Official Bulletin*, vol. 33, 1950, at p. 87.
- [72] For example, in the case of the Montreal Protocol to the Vienna Convention on Substances that Deplete the Ozone Layer, see Fourth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, UN Doc. UNEP/OzL. Pro./4/15.
- [73] See Servais, J.M., ILO standards on freedom of association and their implementation, *International Labour Review*, Vol. 123, No. 6, November–December 1984, pp. 765–781, at pp. 769–770.
- [74] Japan, Report of the Freedom of Association Committee in 1966; Greece, 1966; Chile, 1975; Lesotho, 1975; USA (Puerto Rico), 1981; and South Africa, 1992.
- [75] See *Official Bulletin*, vol. 33, 1950, at p. 87.
- [76] It is impossible to provide clear statistics on this point. There is no official list of cases submitted to the various compliance monitoring procedures. However, a few data can be obtained from an analysis of the reports issued by the Governing Body.

Representation procedure (Articles 24–25): For the period from 1985 to 1994, the ILOLEX Database reports about 30 cases of submission. This figure indicates those cases in which a Committee of the Governing Body has reported to it on the specific case; cases regarding freedom of association have been excluded.

Complaints procedure (Articles 26–34): Between 1961 and 1994, more than 20 complaints were filed, only 8 of which were submitted by the Governing Body to an Commission of Inquiry.

Freedom of Association procedure: Since the creation of this particular procedure in 1950, more than 1,800 complaints have been filed. However, this figure is scarcely representative of the work load of ILO bodies on the implementation of ILO conventions on the freedom of association. In fact, many cases were filed by different associations on the same matter against the same state and have subsequently been joined. Many other cases have been discontinued because states have complied with ILO conventions before the whole procedure could be considered by the Committee on the Freedom of Association.

- [77] See Samson, K.T., The changing pattern of ILO supervision, *International Labour Review*, vol. 118, no. 5, September–October, 1979, pp. 569–587, at p. 579.
- [78] See International Labour Organization, *Conventions and Recommendations Adopted by the International Labour Conference*, International Labour Office, Geneva,

Switzerland, 1995, Convention No. 111 on Discrimination (Employment and Occupation), 1958; and Convention Nos. 97 (1949) and 143 (1975) on Standards Relating to Migrant Workers.

- [79] In November 1974, the Governing Body received a request by the government of Israel to institute the procedure for a study of discrimination in the occupied Arab territories (GB. 194/23/42). After the discussion, it was decided instead to begin the Director-General's reports on the situation in the territories and no special survey was ever carried out. A second attempt occurred in 1982. On this occasion the Committee on Discrimination discussed a communication transmitted to the Office by a Uruguayan trade unionist in exile alleging discrimination on the basis of political opinion. Given that the government of Uruguay's reply contested the procedure itself and that the procedure is based on the State's consent, the Committee could only note the Government's nonacceptance of a special survey (GB.221/13/37, par. 3; GB.222/CD/2/2). See GB.264/6, note 10. For more information on the nonuse of this procedure, see *Report*, 1994, at p. 14.
- [80] See GB.265/LILS/7, par. 14, and GB.265/8/2.
- [81] On the direct contacts procedure, see Von Potobsky, G., On-the-spot visits: An important cog in the ILO's supervisory machinery, *International Labour Review*, vol. 120, 1981, p. 581.
- [82] See International Labour Organization, *Report*, 1968, p. 6. For information on the revision in 1973, see *Report*, 1973, p. 17.
- [83] During 1994, New Zealand and Ivory Coast were visited by direct contacts or advisory missions in the context of cases before the Committee on Freedom of Association. See *Report*, 1995, at par. 40.
- [84] See International Labour Organization, *Report of the Committee of Experts on the Application of Conventions and Recommendations* (par. c), Principles Governing the Procedure of Direct Contacts, Report III, Part 4A, International Labour Conference, 63rd Session, 1977.
- [85] *Ibid.*, par. b.
- [86] See Ghebali, op. cit., at p. 228.
- [87] See Samson, op. cit., at p. 572.
- [88] See *Report*, 1977, (par. e).
- [89] See Samson, op. cit., at p. 573; and Landy, E., The implementation procedures of the International Labour Organization, *Santa Clara Law Review*, vol. 20, 1980, pp. 633–663, at p. 647.
- [90] For example, in the case of six countries in the Andean region, direct contacts took place in 1976 with a view to examining the possibility of uniform application and ratification of some 25 conventions as a means toward harmonization of labor legislation.
- [91] See International Labour Organization, *Report*, 1968, at par. 11.
- [92] On this aspect of the direct contacts procedure, see Valticos, N., Diplomacy in an international framework: Some aspects of ILO practice and experience, *La comunità internazionale*, vol. 3, 1974.
- [93] See Ghebali, op. cit., at p. 228.

- [94] The Committee of Experts began keeping track of cases of progress only in 1964. For more information on cases of progress, see *Report*, 1996, at par. 106. However, as Landy remarked, this figure tells only part of the story; it does not indicate the proportion of cases where the Committee of Experts' observations have led to compliance. See Landy, The implementation procedures of the International Labour Organization, op. cit., at p. 648; Landy, *The Effectiveness of International Supervision*, op. cit., at p. 66.
- [95] For more information on states that have modified their legislation in connection with an ILO convention, see *Report*, 1995, at par. 109.
- [96] See Leary, op. cit., at p. 595.
- [97] Among the studies from scholars are Landy, op. cit.; and Haas, E.B., *Human Rights and International Action: The Case of Freedom of Association*, Stanford University Press, Stanford, CA, USA, 1970, pp. XIII–184. For a study from the ILO, see International Labour Organization, *The Impact of International Labour Conventions and Recommendations*, International Labour Office, Geneva, Switzerland, 1976, p. 104.
- [98] The ILO supervisory system occasionally has another interesting, albeit negative, side effect. When there is pressure to stop violating a standard and a government concludes that it cannot comply, it can free itself from its obligations by denouncing the convention. See Landy, The implementation procedures of the ILO, op. cit., at p. 648, note 39. ILO conventions adopted after 1932 specify that the right of denunciation can be exercised at 10-year intervals. Discussion is underway in the ILO Governing Body to reduce this interval for future conventions. As of 8 December 1995, 76 cases of denunciation without a simultaneous ratification of a revised version of the instrument had been registered. See, *Report*, 1996, at par. 13.
- [99] The ILO has already been considered as a model for improving the effectiveness of environmental treaties. See Palmer, G., New ways of making international environmental law, *American Journal of International Law*, vol. 86, 1992, pp. 259–283, at pp. 280–281.
- [100] See Valticos, Un système de contrôle international, op. cit., at p. 383; Valticos, *Droit internationale du travail*, Dalloz, Paris, France, 1983, at p. 629.
- [101] See Samson, op. cit., at p. 569 and p. 583.
- [102] In international law, “regime” usually refers to a set of rules that are linked to a specific and locally defined subject matter. For example, Article 34 of the United Nations Convention on the Law of the Sea refers to the “. . . regime of passage through the straits . . .” See United Nations Convention on the Law of the Sea, 1982, in I. Rummel-Bulska, and S. Osafo, eds., *Selected Multilateral Treaties in the Field of the Environment (SMTFE)*, UNEP, Nairobi, Kenya, 1991, vol. 2, at p. 165.
- [103] For example, International Convention for the Prevention of Pollution from Ships, (Article 16), adopted at London, 2 November 1973, as amended by the Protocol of 1978, adopted at London, 17 February 1978. See 12 *International Legal Materials (ILM)* 1319 (1973) and 17 *ILM* 546 (1978); United Nations Convention on The Law of the Sea, (Article 313), 2 *SMTFE* 165; Vienna Convention for the Protection

- of the Ozone Layer, (Article 6), 2 *SMTFE* 301; United Nations Convention on Biological Diversity, (Article 30), 31 *ILM* 818; and Framework Convention on Climate Change, (Article 16), 31 *ILM* 849.
- [104] See CITES, Articles XI.3, paragraphs (d) and (e) concerning the Conference of the Parties and Article XII.2, paragraphs (d), (g), and (h) concerning the Secretariat.
- [105] See Sand, P.H., *Lessons Learned in Global Environmental Governance*, World Resources Institute, Washington DC, USA, 1990, pp. VI–61, at p. 14.
- [106] These principles have been enumerated by Valticos. See Valticos, N., Fifty years of standard setting activities by the ILO, *International Labour Review*, vol. 99–100, Sept. 1969, pp. 235–236.
- [107] See Valticos, Once More About the ILO System of Supervision, op. cit., at p. 100.
- [108] See *Report of the Director-General*, Defending Values, Promoting Change, Report I, Part 1, International Labour Conference, 81st Session 1994, at p. 53.
- [109] See Servais, op. cit., at p. 780.
- [110] See Sand, op. cit., at p. 33.
- [111] Protocol on Environmental Protection to the Antarctic Treaty, 1991, (Articles 18, 19, and 20), 2 *Yearbook of International Environmental Law (YBIEL)* 533. United Nations Framework Convention on Climate Change, 1992, (Article 14), 31 *ILM* 849. United Nations Convention on Biological Diversity, 1992, (Article 27 and Annex II), 31 *ILM* 818. United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, 1994, (Article 28), 33 *ILM* 1328 (1994). Convention on Environmental Impact Assessment in a Transboundary Context, 1991, (Article 15 and Appendix VII), UN-ECE, *Environmental Conventions (ECE)*, United Nations, New York, NY, USA, 1992, at p. 95. Convention on the Transboundary Effects of Industrial Accidents, 1992, (Article 21 and Annex XIII), *ECE*, at p. 119. Convention on the Protection and Use of Transboundary Watercourses and International Lakes, 1992, (Article 22 and Annex IV), *ECE*, at p. 161. Convention on the Protection of the Marine Environment of the Baltic Sea Area, 1992, (Article 26), 3 *YBIEL*, supplement on disk (doc.1). Convention for the Protection of the Marine Environment of the North-East Atlantic, 1992, (Article 32), 32 *ILM* 1069 (1993).
- [112] See O'Connell, M.E., Enforcing the new international law of the environment, *German Yearbook of International Law*, vol. 35, 1992, pp. 293–332, at p. 312.
- [113] See *Report*, 1994, at p. 15.
- [114] See Landy, The implementation procedures of the ILO, op. cit., at p. 646.
- [115] See Valticos, Once more about the ILO system of supervision, op. cit., at p. 103.
- [116] For example, the Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, (Article 19), 2 *SMTFE* 449; Organization for African Unity Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, (Article 19), 2 *YBIEL* 632; Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques, 1977, (Article V), 1 *SMTFE* 72; International Convention for the Prevention of Pollution from Ships, 1973, (Article 6), 1 *SMTFE* 320.

- [117] Valticos, L'évolution du système de contrôle de l'Organisation internationale du travail, op. cit., at p. 519.
- [118] Széll, P., The development of multilateral mechanisms for monitoring compliance, in W. Lang, ed., *Sustainable Development and International Law*, Graham and Trotman, London, UK, 1995, pp. 97–109, at p. 107.
- [119] See, for example, Convention on Biological Diversity, (Articles 23.4 and 26), 31 *ILM* 818. Framework Convention on Climate Change (Articles 7.1, 7.2, and 10), 31 *ILM* 849; and Montreal Protocol on Substances that Deplete the Ozone Layer, 1987, (Article 7), 2 *SMTFE* 35. The Convention on the Transboundary Effects of Industrial Accidents, (Article 23), *ECE*, at p. 95, refers generically to a periodical reporting procedure without specifying its content.
- [120] In the environmental field, this is the case with the Montreal Protocol. See, in general, Victor, D.G., The Montreal Protocol's Non-Compliance Procedure: Lessons for making other international environmental regimes more effective, in W. Lang, ed., *Österreichische außerpolitische Dokumentation*, Bundesministerium für auswärtige Angelegenheiten, Vienna, Austria [in English].
- [121] See *Constitution of the International Labour Organization* [Article 19(8)].
- [122] For a description of the different flexibility clauses contained in ILO conventions, see Gheballi, op. cit., at pp. 207–208. For an example of the possibility of opting for parts of a convention, see The Social Security (Minimum Standards) Convention, 1952 (No. 102). For an example of a convention whose scope can be limited with respect to categories of individuals, see The Maternity Protection Convention (as revised), 1952 (No. 103). For an example of a convention whose scope can be limited with respect to territory, see The Fee-Charging Employment Agencies Convention (as revised), 1949 (No. 96). For an example of a convention that allows a range of techniques of protection and application, see The Equal Remuneration Convention, 1951 (No. 100).
- [123] See United Nations Convention on the Law of the Sea, (Article 309). For more information on “package deal” conventions, see the Framework Convention on Climate Change, (Article 24), 31 *ILM* 849; Biodiversity Convention (Article 37), 31 *ILM* 818; Desertification Convention (Article 37), 33 *ILM* 1328; International Tropical Timber Agreement, 1994, (Article 47), 33 *ILM* 1014 (1994); Vienna Convention on the Protection of the Ozone Layer, (Article 18), 2 *SMTFE* 301; Montreal Protocol, (Article 18), 2 *SMTFE* 35; Basle Convention, (Article 26.1), 2 *SMTFE* 449; West Indian Ocean Tuna Organization Convention, 1991, (Article 14), 3 *YBIEL* supplement on disk (doc. 22); Convention for the Protection of the Marine Environment of the North-East Atlantic, 1992, (Article 28), 3 *YBIEL* 759; Protocol on Environmental Protection to the Antarctic Treaty, (Article 24), 2 *YBIEL* 533.
- [124] Concerning the Governing Body, see *Constitution of the International Labour Organization*, [Article 14(1)]. Regarding the Conference's deciding agenda subjects, see Article 16(3) of the ILO Constitution.
- [125] The development period of a convention or a recommendation is rarely less than two and a half years from the time when the subject is chosen until its adoption.

See *Report*, 1994, at pp. 10 and 11 and Standing Orders of the International Labour Conference, December 1994, Articles 38 and 39.

- [126] See Protocol on Environmental Protection to the Antarctic Treaty, (Article 11.2), 2 *YBIEL* 533. See also North-East Atlantic Treaty, (Article 10), 32 *ILM* 1069.
- [127] See Samson, *op. cit.*, at p. 583.
- [128] See North-East Atlantic Treaty, (Article 10), 32 *ILM* 1069. See also Protocol on Environmental Protection to the Antarctic Treaty, (Article 11.2), 2 *YBIEL* 533.
- [129] For an analysis of the limited standing of NGOs in international judicial proceedings, see Shelton, D., The participation of non-governmental organizations in international judicial proceedings, *American Journal of International Law*, vol. 88, 1994, pp. 611–642.
- [130] See *Standing Orders of the International Labour Conference*, [Articles 7 bis and 55(3)], International Labour Office, Geneva, Switzerland, December 1994.
- [131] For information about the regular procedure, see *Report*, 1996, at par. 78. Non-State actors played key roles in the following six cases before the ILO Commissions of Inquiry: workers delegates against Greece, filed in 1968; workers delegates against Dominican Republic and Haiti, 1981; workers delegates against Poland, 1983; a workers organization against the Federal Republic of Germany, 1985; International Labour Conference delegates against Romania, 1989; and International Labour Conference delegates against Nicaragua, 1989. For more information on cases where non-State actors have initiated representations or the freedom of association procedure, see, in general, the Reports of the Committee on Freedom of Association, published in the ILO Official Bulletin.
- [132] See Leary, *op. cit.*, at p. 617.
- [133] For the Additional Protocol, see Protocol Amending the European Social Charter Providing for a System of Collective Complaints, Strasbourg, 9 November 1995, in 34 *ILM* 1453 (1995) (not yet in force). See also 1961 European Social Charter, in 529 *UNTS* 89. As of July 1995, 20 Member States of the Council of Europe have ratified the Charter, while 16 other members have not yet acceded to it. Under the European Social Charter, Member States are required to submit reports on the implementation of the Charter to a Committee of Independent Experts. The report of the Committee of Independent Experts will subsequently be forwarded to the Governmental Committee and, finally, to the Committee of Ministers of the Council of Europe. Yet, the Social Charter does not foresee the possibility of individual complaints, nor can any judicial or semi-judicial organ reach decisions binding on governments. Conversely, under the Additional Protocol international and national organizations can submit complaints to the Committee of Independent Experts. In the case of non-State entities, however, a special declaration by the State concerned recognizing this right is required. Any such complaint is examined by the Committee of Independent Experts. After hearing submissions from both sides and observations by other contracting parties, international organizations, and employers or workers organizations, the Committee draws up a report in which it determines the eventual existence of the alleged noncompliance of the party concerned. This report, published in due course, is then forwarded to the Council

of Ministers and serves as the basis for a recommendation to the State concerned indicating the measures that should be taken to get back into compliance.

- [134] On the seminal role played by Albert Thomas in the creation of the ILO and its early management, see Phelan, E.J., *Albert Thomas et la création du BIT*, B. Grasset, Paris, France, 1936.
- [135] See Princen, T., Finger, M., and Manno, J., Non-governmental organizations in world environmental politics, *International Environmental Affairs*, vol. 7, 1995, pp. 42–58, at p. 43.
- [136] See Servais, J.M., ILO Standards on freedom of association and their implementation, *International Labour Review*, vol. 123, no. 6, November–December 1984, pp. 765–781, at pp. 769–770.
- [137] For rules on the circulation of reports, see *ILO Constitution*, [Article 23(2)]. For rules on the circulation of other official ILO documents, see ILO Convention No. 144 and Recommendation No. 152 (Tripartite Consultation).
- [138] Palmer, op. cit., at p. 280.
- [139] See International Labour Standards Department, *Handbook of Procedures Relating to International Labour Conventions and Recommendations*, International Labour Office, Geneva, Switzerland, 1995, par. 84.
- [140] Ibid.
- [141] See Leary, op. cit., at p. 589.
- [142] United Nations Convention on Biological Diversity, (Articles 12 and 13), 31 *ILM* 818; United Nations Framework Convention on Climate Change, (Articles 5 and 6), 31 *ILM* 847.
- [143] On the importance of objectivity and impartiality of ILO supervisory bodies see Valticos, Un système de contrôle international: la mise en oeuvre des conventions internationales du travail, op. cit., at pp. 386–387.
- [144] See Von Potobsky, op. cit., at p. 595.
- [145] For a first assessment of the Framework Convention on Climate Change “country visit” procedure, see Asunção, L., Stiansen, P., and Williams, M., Teams start in-depth review of national communications, *Climate Change Bulletin*, no. 8, 1995, pp. 2–4.
- [146] See *Report*, 1994, at p. 15.
- [147] See International Labour Organization, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, 3rd ed., International Labour Office, Geneva, Switzerland, 1985.
- [148] See Leary, op. cit., at p. 604.
- [149] See, 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas (Article 10.2), 1 *SMTFE* 133. See also, United Nations Convention on the Law of the Sea (Article 290), 2 *SMTFE* 165; and Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982, Relating to the Conservation and Management of Straddling Stocks and Highly Migratory Fish Stocks, 4 August 1995, (Article 31), 34 *ILM* 1542 (1995).

Appendixes I and II of the
Fifth Item on the Agenda
Reports of the Committee on Legal Issues
and International Labour Standards, GB. 261/5/27
International Labour Office, Governing Body,
Geneva, Switzerland
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Appendixes and figures 1 and 2 missing